

Earle Industries, Inc. and Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board. Cases 26-CA-14700 and 26-CA-14759

October 21, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS DEVANEY
AND COHEN

On March 17, 1993, Administrative Law Judge John H. West issued the attached decision. The General Counsel and the Charging Party have filed exceptions and supporting briefs, and the Respondent has filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

Background

Earle Industries is an employer engaged in the manufacture of closet accessories in Earle, Arkansas. The Union began an organizing campaign among the Respondent's employees in January 1991.² Pursuant to a petition filed by the Union on January 27, a secret ballot election was held among the Respondent's employees on March 8. Although the Union received a majority of the ballots cast, the results of that election were set aside by the Board based on objections filed by the Respondent and a second election was directed.³ The

¹ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's discrediting of discriminatee Earley Mae Wallace, however, we find it unnecessary to rely on the judge's discussion of Wallace's testimony at a prior hearing concerning objections filed by the Respondent to an election held on March 8, 1991. Although the hearing officer in that case did not credit Wallace's testimony in certain critical respects, there was no finding in that case that Wallace deliberately made false statements. Moreover, we note that even if such a finding had been made, it would not be determinative of Wallace's credibility in the instant case. *Adams Delivery Service*, 237 NLRB 1411, 1418 (1978), enf. 623 F.2d 96 (9th Cir. 1980).

² Unless otherwise noted, all dates hereafter are in 1991.

³ Specifically, the Board found that the Union had engaged in objectionable conduct by its agents having videotaped employees. In this regard, the Board adopted the hearing officer's finding that Wallace's testimony that union officials had told employees at a meeting that the film crew was an independent film crew working on a documentary was not credible. In making this credibility determination,

second election was held on October 25. The Union again received a majority of the ballots cast and subsequently was certified by the Board as the representative of the Respondent's employees.⁴

On October 1, the Union sponsored a rally at the Respondent's premises in support of its organizing campaign. The rally began at approximately 11:30 a.m., during the employees' lunch period, when some employees began distributing union buttons to other employees in the Respondent's parking lot. Shortly thereafter, the Reverend Jesse Jackson, accompanied by union representatives and members of the media, arrived at the entrance to the parking lot. A few minutes later, a union representative drove a large flat bed truck into the parking lot. Reverend Jackson climbed onto the trailer bed and began speaking to the assembled employees about the benefits of organization.

At the Respondent's request, the Earle police stopped the rally by driving the truck—with Reverend Jackson and others still on it—out of the parking lot. The Earle police also arrested two union representatives, handcuffed them, and placed them in a police car. Reverend Jackson subsequently saw the two union officials in the police car and told them that he would try to see the Respondent's owner and get them released. A videotape of this event, taken by a local television station and introduced as an exhibit in this case, shows Jackson reentering the parking lot and walking toward the plant's employee entrance. As he does so, employee Blanche Bowers can be seen making encouraging gestures. Jackson then entered the plant through the employee entrance, together with a number of other individuals and the media. Just after Jackson passed through the door, Wallace entered the door, passed Jackson, and began walking in front of him down an aisleway leading toward the plant's front office.

Jackson was intercepted almost immediately by Personnel Manager Gary Smith, who informed Jackson that he was trespassing and repeatedly asked him to leave the plant through the employee entrance and re-enter through the front entrance, which was designated for visitors.

During the course of this discussion between Smith and Jackson, employee Earley Mae Wallace inter-

the hearing officer stated that Wallace had admitted that she had not heard everything the union official said about the film crew at the meeting, and that her testimony was "evasive and argumentative," "responsive to what she perceived most advantageous to Petitioner's case rather than genuinely factual," and not "forthright or spontaneous." *Earle Industries*, Case 26-RC-7346 (Aug. 28, 1991) (unpublished decision).

⁴ See *Earle Industries*, Case 26-RC-7346 (June 4, 1992) (unpublished decision). The Board's certification was subsequently upheld by the United States Court of Appeals for the Eighth Circuit. See *NLRB v. Earle Industries*, 999 F.2d 1268 (1993), enf. 308 NLRB No. 134 (Sept. 23, 1992) (unpublished summary judgment ordering Respondent to bargain with Union).

jected, "Front door locked. C'mon." and "office this way," pointing in the direction of the front office. Smith responded, "[N]o ma'am," to Wallace and repeated his instructions to Jackson that he leave the plant. Wallace repeated the statement that the door was locked and subsequently pointed in the direction of the front office and stated, "[R]ight over there." Other employees also can be seen on the videotape pointing towards the front office and cheering for Jackson. Jackson did not leave, but, instead, requested that Smith accompany him out of the plant and back through the front entrance. Smith refused to do so, eventually announced that he would not argue with Jackson further, turned around, and walked back to the front office with Jackson behind him. Subsequently, after discussing the matter with the Earle police, Jackson left the plant through a side entrance, re-entered through the front door, and met with Senior Vice President Peter Felsenthal. The entire incident described above, from Jackson's entry into the plant to the time he entered the foyer to the front office, took less than 2 minutes.⁵

The Respondent took no immediate action against any employee in connection with the October 1 incident and declined to press charges against either Jackson or the union representatives whom the police had previously arrested. However, later that day, Felsenthal and Smith met to discuss the incident. Smith told Felsenthal that Wallace had undermined his authority in the presence of other employees by interfering with his efforts to make Jackson leave the plant, and that severe disciplinary action was warranted. Felsenthal testified that he instructed Smith to investigate the incident before any discipline was imposed.⁶

The next step in the investigation was the Respondent's receipt, on October 5, of a videotape of the October 1 incident taken by a local television station. Felsenthal reviewed the videotape, in the company of the Respondent's attorney, on October 6. Based on his review of the tape and on further discussions with Smith that night, Felsenthal determined that termination was warranted under the circumstances, although he testified that he had not reached a final decision at that time.

On October 7, Smith interviewed employees Joe Blockmon, Michelle Smith, and Debbie Evett—individuals whom he identified from the videotape as having been in the background during the October 1 inci-

dent. However, Smith testified that none of these individuals provided any additional information concerning the incident. Later on October 7, Felsenthal, Smith, and Supervisor Louise Eskridge met with Wallace to question her concerning her actions. Initially, Wallace refused to answer the questions put to her by Felsenthal, stating that she wanted to protect herself and did not understand why Felsenthal was questioning her. Felsenthal then told her that her failure to cooperate in the investigation was itself a violation of the Respondent's policies and reiterated the questions he had previously posed. Thereafter, Wallace responded to Felsenthal's questions and denied any wrongdoing. In the course of her responses, Wallace denied engaging in certain conduct which she is shown to have engaged in in the videotape; at the hearing in this case Wallace acknowledged that her answers to those questions were untrue.⁷ At the conclusion of the interview, the Respondent advised Wallace that she was suspended for violation of plant rules and the following day, October 8, Wallace was terminated.⁸

Over the course of the following 2 weeks, the Respondent took statements from other employees concerning the Jackson incident. In this regard, employee Van Welch's statement identifies employees Marilyn Mathis and Linda Davis as individuals who also pointed Jackson to the office door. Davis was never interviewed, counseled, or disciplined by the Respondent. While Mathis was interviewed by Smith, there is no evidence that he asked her if she had pointed toward the front office, and she was not counseled or disciplined. Further, Smith told Mathis that he would not ask her to identify other employees who were involved in the incident (to which Mathis replied that she would not tell him anyway) and accepted without comment her refusal to state what she had heard of Smith's conversation with Jackson. On October 17, employee Cassandra Riley gave a statement in which she indicated that Wallace guided and directed Jackson to the employee entrance and turned him away from the visitor's entrance towards which he was facing when Wallace grabbed his arm.⁹

⁷Specifically, Wallace stated that: (1) she never told Reverend Jackson that the front door was locked; (2) she did not motion to or encourage Jackson to enter the plant's front office; and (3) she did not show Jackson and others the way to the front office while they were inside the plant. The Respondent tape-recorded the interview with Wallace and a transcript of that recording is attached to the judge's decision in this case.

⁸On October 8, the Respondent interviewed employees Frances Jones and Maggie Lucas, who provided affidavits concerning their observations of the October 1 incident. These affidavits, like the videotape, indicate that Wallace motioned for Jackson to continue moving toward the front office during his encounter with Smith.

⁹The statements taken by the Respondent also generally reflect that many employees were enthusiastically encouraging Reverend Jackson to continue to the front office before, during, and after his encounter with Smith.

⁵See *Earle Industries*, 999 F.2d at 1270.

⁶The Respondent obtained affidavits from a number of individuals on October 1 describing the Jackson incident that day, which were used in support of an unfair labor practice charge filed by the Respondent against the Union. However, the Respondent concedes that none of these affidavits indicate that Wallace engaged in insubordinate conduct on October 1. The unfair labor practice charge filed by the Respondent was dismissed by the Regional Director for Region 26.

On October 23, 2 days before the second election, the Respondent placed its parking lot off limits to non-employees, giving the October 1 incident as the reason for its new policy. Prior to that date, nonemployees were allowed into the parking lot but supposedly were not allowed into the plant area without the Respondent's permission. Nevertheless, nonemployees had entered the plant area without permission on a number of occasions. Specifically, Supervisor Diane Moody's boyfriend, Melvin Witherspoon, visited her on many occasions prior to October 1, apparently without incident. In July 1991, a large group of Moody's relatives entered the plant looking for Supervisor Barbara Moody. Neither Diane nor Barbara Moody were ever warned concerning these incidents.¹⁰ Likewise, as discussed more fully in the judge's decision, prior to October 1991, nonemployees visited employees Delores Knighten, Burnette Glenn, and Bobbie Smith; these employees also were not disciplined. Many employees testified that nonemployees frequently visited the plant prior to October 1. Although Smith admitted that no employee had ever been warned for violations of its rule limiting nonemployee access to the plant prior to October 1, Smith also testified that he had previously ordered unauthorized nonemployees to leave the plant when he found them there.

The Judge's Decision

The judge found that Wallace's actions on October 1 were concerted activity within the meaning of Section 7 of the Act, but that they were not protected by the Act. In this regard, the judge found that Wallace encouraged Jackson to proceed through the plant to the front office notwithstanding Smith's directive that Jackson leave the plant by falsely stating that the visitor's entrance was locked.¹¹ The judge further found that Wallace's conduct in this regard was insubordinate and defiant of Smith's authority. Balancing Wallace's right to engage in concerted activity against the Respondent's right to maintain discipline, order, and respect in its establishment, the judge concluded that Wallace's encouraging Jackson to continue through the plant through the use of deliberate falsehoods in defiance of Smith's directions was not protected by the

Act and "clearly warranted Wallace's termination."¹² The judge also found that Wallace's lying about her actions on October 1 in the October 7 interview with Felsenthal was unprotected as well.

The judge rejected the General Counsel's contention that the Respondent had disparately enforced its policy against nonemployee access to the plant floor. Although acknowledging that there was contradictory evidence on this point and that the Respondent may not have policed the area as well as possible and may have occasionally failed to expel unauthorized nonemployees found on the plant floor, the judge concluded that none of those incidents rose to the "severity" of the October 1 incident. The judge also noted, in this regard, that the Respondent's facility is a manufacturing plant which is not open to the public and that the entrance through which Jackson entered is marked for "employees only."

The judge found that the Respondent terminated Wallace because of her unprotected activities and not because of her union activity. In this regard, the judge found that a *prima facie* case had not been established under *Wright Line*,¹³ as the General Counsel had not demonstrated union animus on the Respondent's part. Even if a *prima facie* case had been established, the judge stated that he believed that the Respondent had shown that it would have terminated Wallace even absent her union activity and any concerted protected activity in which she may have engaged.

Finally, the judge found that even if Wallace's termination was found to be unlawful, she was not entitled to reinstatement because her conduct in connection with this proceeding rendered her unfit for further service. Thus, the judge stated that Wallace "admittedly" lied in her affidavit to the Board about having said that the door was locked, a matter which the judge viewed as "very significant" to the decision to issue a complaint in this case. The judge also stated that Wallace had lied in her testimony in this case and in a prior Board proceeding involving the Respondent.

The Exceptions

The General Counsel excepts to the judge's dismissal of the 8(a)(1) and (3) allegations with regard to Wallace's termination. In the General Counsel's view, Wallace's actions on October 1 were not so flagrant or extreme as to lose the protection of the Act. Thus, the General Counsel argues that the Respondent had not

¹⁰ After October 1, Diane Moody was twice warned that she should tell Witherspoon not to come into the plant. The Respondent explained that Moody was never disciplined for Witherspoon's intrusions because it had no evidence that she had requested that he enter the plant. Also, after the charges were filed in this case, Smith launched an investigation into the incident involving the Moody relatives; according to Smith the investigation disclosed no evidence that Barbara Moody had encouraged her relatives to enter the plant.

¹¹ The judge did not credit Wallace's testimony that she had heard that the front door was locked.

¹² The judge also inexplicably found that the Respondent reasonably could have believed, based solely on the videotape, that Wallace had led Jackson into the plant through the employee entrance even though the tape shows Jackson entering first. However, the judge found it unnecessary to rely on this point in finding that Wallace's activities on October 1 were unprotected.

¹³ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1980), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

disciplined other employees for engaging in the same conduct both in other incidents where nonemployees entered the plant and in the case of the Jackson incident itself. Further, the General Counsel argues that the Jackson incident was no more than a brief, nonconfrontational encounter in a nonwork area during nonwork time, which did not warrant the extreme sanction of dismissal in light of the Respondent's past practice. In this regard, the General Counsel asserts that the judge's finding of no union animus is erroneous, noting in particular that the Respondent has committed many prior unfair labor practices and twice having terminated Wallace prior to this incident.

The Union's exceptions also assert that the judge erred in failing to find that Wallace's termination was unlawful.

Prior Decisions

On June 4, 1992, the Board issued its decision overruling the Respondent's objections to the election held at its plant on October 25, 1991, and certifying the Union as its employees' representative. In this regard, the Respondent's objections were based in large part on the same events which are at issue in this case. In finding that the October 1 Jackson incident did not constitute objectionable conduct, the Board found that

Reverend Jackson's unauthorized entry into the plant occurred during unit employees' non-work time in a non-work area; lasted less than two minutes; . . . and did not include any threats, violence or "shouting matches" between Smith and Jackson.

Earle Industries, Case 26-RC-7346 (unpublished decision), slip op. at 4.

Subsequently, the Board's certification of the Union was upheld in all respects by the United States Court of Appeals for the Eighth Circuit. Thus, the court of appeals agreed with the Board that

the actions of October 1, 1991, both inside and outside the plant, were restrained in nature. Neither Reverend Jackson nor other union agents made any threats of violence against Earle Industries' management, employees, or property, either before or after Reverend Jackson entered the plant. The Board noted that Reverend Jackson's exchange with Smith was "quiet and civil."

Contrary to Earle Industries' assertions, the evidence does not show that employees erupted into a frenzy or near-riot. Rather, the evidence supports the Board's finding that most employees returned to their job stations on time at the end of the lunch period during which the rally occurred and that the few employees who returned late were tardy by only a few minutes. Manager Smith himself admitted that there were no threats or vio-

lence at any point during the union-sponsored activities.

NLRB v. Earle Industries, above, 999 F.2d at 1273.

Analysis

We agree with the judge that Wallace's participation in the Union's October 1 organizing rally, together with her actions in connection with Reverend Jackson's entry into the Respondent's plant, were concerted activity within the meaning of Section 7 of the Act and we note that no party has excepted to this finding. For the reasons that follow, however, we find, contrary to the judge, that Wallace's actions on October 1, and during the course of her subsequent, related interrogation by the Respondent on October 7, were protected activity. Because the Respondent admits that it terminated Wallace based on those actions, we find that it thereby violated Section 8(a)(3) and (1) of the Act.

The standard for determining whether an employee's actions are protected by the Act is well settled. As the Board observed in *Health Care Corp.*, 306 NLRB 63, 65 (1992),

[t]he Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves. The Board and the courts have found, nonetheless, that an employee's flagrant, opprobrious conduct, even though occurring during the course of Section 7 activity, may sometimes lose the protection of the Act and justify disciplinary action on the part of an employer. Not every impropriety, however, places the employee beyond the protection of the Act.

See also *Brunswick Food & Drug*, 284 NLRB 663 (1987); *Postal Service*, 241 NLRB 389 (1979); *Crown Central Petroleum*, 177 NLRB 322 (1969), enf'd. 430 F.2d 724 (5th Cir. 1970).

Applying this standard, we find that Wallace's encouragement of Reverend Jackson to proceed to the front office falls within the degree of latitude which the Act affords employees in order to ensure that they may freely exercise their Section 7 rights. Consistent with the Eighth Circuit's and the Board's prior decisions involving this incident, we note initially that the entire incident on October 1 was a brief, quiet, civil, and nonthreatening encounter in a nonwork area of the plant during nonwork time which lasted less than 2 minutes. Wallace's involvement in the incident was even briefer, as it consisted solely of her encouraging Reverend Jackson, once he was already inside the plant, to proceed to the Respondent's front office and

to meet with Felsenthal, and her indicating to Jackson where the front office was located.¹⁴

Concededly, Wallace's actions were contrary to the Respondent's clearly expressed desire that Reverend Jackson leave its plant and re-enter through the front door. However, and contrary to the judge, an employee's actions do not lose the protection of the Act merely because they may be viewed as "insubordinate." See *Severance Tool Industries*, 301 NLRB 1166 (1991); *Burle Industries*, 300 NLRB 498 (1990); *F. W. Woolworth Co.*, 251 NLRB 1111 (1980), *enfd.* 655 F.2d 151 (8th Cir. 1981), *cert. denied* 455 U.S. 989 (1982).¹⁵ Moreover, the Respondent's contention that Wallace's conduct was "flagrant" and "extreme" is belied by the Eighth Circuit's holding that the actions of October 1 were "restrained" in nature, and by the Respondent's disparate treatment of other employees who similarly encouraged Reverend Jackson to ignore Smith and continue into the plant. Thus, both the videotape of the October 1 incident and the Respondent's post-October 7 investigation clearly show that other employees applauded Reverend Jackson's dialogue with Smith and even pointed toward the Respondent's employee entrance in an effort to direct Jackson to Felsenthal. None of these individuals was disciplined. Indeed, with respect to many of the individuals identified as having engaged in conduct similar to Wallace's, the Respondent failed to show that it even con-

¹⁴ In this regard, we find, contrary to the judge, that the videotape cannot reasonably be viewed as indicating that Wallace led Jackson into the plant through the employee entrance. Moreover, the Respondent admits that, at the time the termination decision was made, it was not aware of and did not rely on employee Riley's statement that Wallace directed Jackson toward the plant's employee entrance. Accordingly, we find it unnecessary to decide whether such conduct would have been protected under the Act and we further find it unnecessary to pass on the Union's exceptions to the judge's credibility resolutions with regard to this aspect of the case.

We further note that Jackson's entry was prompted, at least in part, by the Respondent's having caused the removal of the truck from the parking lot with Jackson aboard and the arrest of two union officials who had also participated in the rally in the parking lot on October 1. Under these circumstances, and based on our review of the videotape of the incident, we perceive no evidence to indicate that Jackson's entry into the plant was the result of some conspiracy or preconceived plan, much less that Wallace was party to any plan of this sort.

¹⁵ In *F. W. Woolworth Co.*, the Board found that the employer violated the Act by discharging an employee who persisted in asking questions at a captive-audience meeting, in defiance of the employer's policy prohibiting such questions and a manager's directions that the employee take his seat. In this regard, the Board adopted the judge's finding that

[C]ongressional guarantees embodied in Section 7 of the Act would be jeopardized if every act of disrespect or insubordination emerging from a protected dispute which divides management from its workforce, renders the employee involved as fair game for discipline. [*Id.* at 1114.]

We therefore disagree with our dissenting colleague's apparent assertion that conduct involving insubordination or untruthfulness is per se unprotected, and we note that no authority is cited for this proposition.

ducted any investigation as it did with respect to Wallace.

Moreover, the Respondent's lax enforcement of its no-access policy in other, prior, cases, as noted above, further indicates that Wallace's conduct was not so egregious as to lose the Act's protections. The judge found that the evidence adduced by the General Counsel in this regard was unpersuasive because the prior incidents were not of the same magnitude as the October 1 incident. We disagree. Regardless of whether the prior incidents are sufficiently similar to support a finding of disparate treatment, the threshold inquiry is whether Wallace's part in Reverend Jackson's violation of the no-access rule is so extreme and flagrant as to lose the Act's protections. We find that the Respondent's failure to impose any discipline whatsoever for violations of this rule prior to October 1 undermines the Respondent's characterization of the severity of Wallace's conduct in the incident at issue here.

Indeed, the Respondent has punished much less severely an instance of "insubordination" or failure to "cooperate" with an investigation similar to that which it claims occurred here. In this regard, shortly after Wallace's termination, employee Gary Hicks received a 3-day suspension for refusing to identify—in response to inquiries by his supervisor and by Smith—powder contained in a foil packet found at Hicks' work station.¹⁶ Moreover, Smith admitted that since 1989, no other employee has been terminated by the Respondent for failing to cooperate with an investigation.

We note additionally that the Respondent's disparate treatment of employees engaged in concerted activities in this regard is entirely consistent with its previously demonstrated animus towards unions in general and toward Wallace in particular as reflected in a long history of engaging in unfair labor practices in response to union organizing drives. Thus, the Respondent unlawfully reacted to a 1963 union organizing campaign by threatening plant closure and other reprisals, purposely creating the impression of impending plant closure in the event of union success, interrogating employees, and attempting to force employees to wear "Vote No" signs prior to the election. *Earle Industries*, 146 NLRB 536 (1964).

Subsequently, a week prior to an election held on November 29, 1977, the Respondent unlawfully terminated Wallace—a known union supporter and a member of the union's organizing committee. The Respondent reinstated Wallace with backpay on October 25, 1978, in accordance with a settlement agreement resolving unfair labor practice charges filed concerning her termination. See *Earle Industries*, Case 26-CA—

¹⁶ Hicks ultimately told Smith that the powder was only salt, after repeated questionings and after Smith had independently had the powder analyzed by the local police.

7174. However, only 1 month later the Respondent unlawfully terminated Wallace—along with four other union supporters—because of their union activities and in order to prevent them from voting in an upcoming Board election. *Earle Industries*, 260 NLRB 1128 (1982). Contrary to the judge, we find that the Respondent's past history of unlawful activity—and its repeated terminations of Wallace herself—support a finding of union animus notwithstanding the passage of time between some of these events and the events at issue in this case.

Under all the circumstances of this case, we find that the General Counsel has shown that Wallace's actions on October 1, on behalf of the union organizing campaign, constituted protected, concerted activity within the meaning of Section 7 of the Act.¹⁷

In light of this finding, it follows necessarily that the Respondent cannot rely on Wallace's failure to "cooperate" in its October 7 interrogation concerning those activities, or any false statements which she made in response to Felsenthal's questions, as a justification for her termination.¹⁸ It is well settled that interrogating an employee about protected concerted activities is unlawful even though the activities in question were conducted openly. *Farr Co.*, 304 NLRB 203, 216–217 (1991). As such, even though the Respondent's October 7 interrogation was not alleged to have independently violated the Act, Wallace was under no obligation to "cooperate" with the Respondent's coercive questioning or to provide the Respondent with the information it sought with respect to her protected concerted activities. In this regard, the interrogation at issue here was particularly coercive in that it was conducted in Felsenthal's office by the Respondent's top management officials and in light of this Respondent's having previously unlawfully terminated Wallace. Moreover, we note that Wallace initially endeavored to merely refrain from providing any answer to these questions, and any false responses were made only after Felsenthal implicitly threatened

her with discipline on the basis of her silence. Under these circumstances, we find that Wallace's responses to the questions put to her by the Respondent on October 7 were a continuation of her protected, concerted activities on October 1, and that the Respondent's decision to terminate her on the basis of those responses, and on the basis of her other protected concerted activities on October 1 as set forth above, was unlawful.¹⁹

REMEDY

In order to remedy the unfair labor practices which we have found, we shall order the Respondent to cease and desist, and to take certain affirmative action necessary to effectuate the purposes of the Act. Contrary to the judge, we find that it will effectuate the purposes of the Act to require the Respondent to offer Wallace full and immediate reinstatement to her job as a service girl in the tops and bottoms department and to make her whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge on October 8, 1991, with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²⁰ Thus, we find that Wallace is entitled to reinstatement and backpay even though she repeated, in her affidavit to the Board and at the hearing, the false statements concerning her actions on October 1 which she first made to the Respondent during the October 7 interrogation. See *ABF Freight System*, 304 NLRB 585, 591 (1991), *enfd. sub nom. Miera v. NLRB*, 982 F.2d 441 (10th Cir. 1992), *affd. sub nom. ABF Freight System v. NLRB*, 114 S.Ct. 835 (1994). In this regard, we note that the matters about which Wallace testified falsely were not determinative of the merits of this case, as we have found that Wallace did not lose the protection of the Act even without regard to the false testimony. Further, while we, of course, do not condone false testimony we also note that Wallace may well have felt compelled to conform her testimony in this proceeding to the statements which she made during the course of the coercive interrogation described above. To fail to require the reinstatement of Wallace in such circumstances would re-

¹⁷In finding that Wallace's actions on October 1 were protected activity, we emphasize that we have viewed the same videotape of the incident on which the Respondent relied in deciding to terminate Wallace. We disagree with our dissenting colleague's assertion that the videotape indicates that Wallace was guilty of "gross misconduct."

¹⁸The Respondent identified this as the most significant factor in its decision to terminate Wallace in 1991.

The General Counsel contends that the interview was a sham designed by the Respondent to set Wallace up to be terminated and thus further evidence that the termination itself was unlawful. In this regard, the General Counsel notes that Felsenthal admitted that, based on his viewing of the videotape, he knew the answer to most of the questions which he posed to Wallace. Further, the General Counsel asserts that the circumstances surrounding the Respondent's decision to tape record the interview are suspicious, as is its failure to similarly investigate other employees involved in the October 1 incident. In light of our findings above, we find it unnecessary to pass on the General Counsel's contentions in this regard.

¹⁹Because the only reasons advanced by the Respondent for Wallace's discharge involve activities which we have found to be protected concerted activities under the Act, we find it unnecessary to analyze this case under the Board's *Wright Line* framework, which is applied in "mixed motive" cases where a legitimate, nondiscriminatory reason for adverse employment action has also been advanced. Cf. *Alaska Pulp Corp.*, 296 NLRB 1260 (1989) (employee denied reinstatement for testifying before Congress and for letter protesting employment conditions); *F. W. Woolworth Co.*, above (employee terminated for asking questions at captive audience speech). We thus respectfully disagree with our dissenting colleague's apparent suggestion that we have found that Wallace was discharged for some unspecified antecedent union activity.

²⁰Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

ward the Respondent for having subjected Wallace to that interrogation if we failed to provide our traditional remedies in this case. Finally, in light of this Respondent's longstanding unlawful efforts to prevent its employees from exercising their right to freely choose whether to engage in collective bargaining, we find that reinstatement with backpay is necessary to "dissipate the deeply coercive effects upon other employees who may desire self-organization, but have been discouraged therefrom by the threat to them implicit in the discrimination." *Phelps Dodge Corp.*, 35 NLRB 418 (1941).²¹

ORDER

The National Labor Relations Board orders that the Respondent, Earle Industries, Inc., Earle, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees or otherwise discriminating against them because they have engaged in union or other protected, concerted activities.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Earley Mae Wallace full and immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to Earley Mae Wallace's unlawful discharge and notify her in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, on request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Earle, Arkansas, copies of the attached notice marked "Appendix."²² Copies of

²¹ Our dissenting colleagues does not explain why the mitigating circumstances described above should not be taken into account, given that Wallace's termination violated the Act, nor does the dissent explain how the effects on other employees of the Respondent's third termination of Wallace (two of which have been found to be unlawful, while the third was rescinded as part of a settlement of a charge filed with the Board) could be dissipated, particularly against the background of clear, longstanding union animus described above, if the Respondent's actions were found to be unlawful yet reinstatement with backpay was not ordered.

²² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER COHEN, dissenting.

The judge found that employee Wallace engaged in insubordinate conduct on October 1 and that she intentionally lied in the process of doing so. The judge further found that Wallace again lied to Respondent on October 7, during the subsequent investigation of the incident. I would adopt the judge's factfindings. Further, the judge concluded that the acts of insubordination and prevarication were unprotected. I would agree with that legal conclusion; my colleagues would not. Finally, the judge found that Respondent discharged Wallace for her misconduct. I would affirm this factfinding; my colleagues would not. For all of these reasons, I dissent from the decision of my colleagues.

In brief, the evidence establishes that the Union was engaged in an organizational campaign among the Respondent's employees. In connection therewith, Reverend Jackson (a nonemployee of the Respondent) made an unauthorized entry into the Respondent's plant during a rally at which he spoke. The Respondent directed him to leave, although it was willing to permit his reentry through a visitor's entrance. It is clear that the Respondent had a right to direct Jackson to leave.¹ It is equally clear that employee Wallace sought to thwart this lawful directive. According to the judge, she did so by falsely telling Jackson that the visitor's entrance was locked and indicating that he should therefore continue his foray through the plant toward Respondent's offices. The judge also found that Wallace repeated the lie, even after Respondent's agent truthfully said that the visitor's entrance was unlocked.

Based on these facts, the judge found that Wallace was insubordinate and that she lied repeatedly in the process. I agree. Further, in agreement with the judge and contrary to my colleagues, I would not give statutory protection to such gross misconduct.²

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992). The judge found that there was no disparate enforcement of the Respondent's no-access rule. My colleagues do not challenge this finding.

² Contrary to the suggestion of my colleagues, I am not asserting that insubordination or untruthfulness are per se unprotected. I sim-

In addition, when Respondent investigated this incident on October 7, Wallace made the following statements to Respondent: (1) she never spoke to Jackson in the plant; (2) she never told Jackson that the front door was locked; (3) once inside the plant, she did not show Jackson the way to the office; and (4) she never motioned or encouraged Jackson to enter the office. As found by the judge, and as graphically detailed by video-tape evidence, all of these statements were intentionally false. I adopt this finding. Further, unlike my colleagues, I would not afford statutory protection to such misconduct.

My colleagues say that Wallace simply failed to cooperate in the investigation. However, as shown, she did more—she lied. Even wider of the mark is my colleagues' assertion that Respondent, by conducting the investigation, somehow caused Wallace to lie. Given the incident of October 1, Respondent clearly had a right to inquire; Wallace had a duty to answer truthfully.³ Because she chose not to do so, she is responsible for the consequences.

Finally, the judge found that the Respondent discharged Wallace for the aforementioned misconduct. I agree. My colleagues argue that Wallace was discharged for antecedent protected union activity. In this regard, they assert that other employees engaged in comparable misconduct and that Wallace was singled out. The simple response is that no employee engaged in conduct that is even remotely comparable to that of Wallace. No employee engaged in the misconduct of being insubordinate, lying during the insubordination, and lying again thereafter.⁴

For the foregoing reasons, I would affirm the judge's finding that the discharge was lawful.⁵

In addition, even if the discharge were unlawful, I would not award reinstatement and backpay. In support of that remedy, my colleagues rely on *ABF Freight*.⁶

ply conclude that the combination of the two in the rather brazen circumstances of this case is unprotected.

³There is no contention that *Weingarten* rights were abridged. *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

⁴My colleagues say that they are not contending that Wallace was discharged for antecedent union activity. However, I note that they rely on prior discriminatory actions aimed at Wallace, and they assert that Wallace was treated disparately in this case. In these circumstances, I consider it prudent to make it clear that this theory of violation is not a viable one.

⁵I recognize that Respondent committed unfair labor practices 28 years earlier and discriminated against Wallace 12–14 years earlier. However, at most, this conduct may help to establish a *prima facie* case that Respondent discriminated against Wallace here. Assuming arguendo such a *prima facie* case, Respondent clearly met its *Wright Line* burden of showing that it would have discharged Wallace in any event for her misconduct.

⁶804 NLRB 585, 589–591 (1991), *enfd.* sub nom. *Miera v. NLRB*, 982 F.2d 441 (10th Cir. 1992), *enfd.* sub nom. *ABF Freight System v. NLRB*, 114 S.Ct. 835 (1994).

However, the circumstances here are far more egregious than those *ABF*. Here, Wallace lied repeatedly, as part of an act of insubordination. She repeated the lies during Respondent's investigation of the matter. She also lied to the Board, both in the affidavit that she gave to the Regional Office and again in her testimony in this proceeding. In these circumstances, the grant of remedial relief has the effect of rewarding someone who has grossly abused Board processes. In addition, it requires Respondent to place back into service an insubordinate and lying employee.⁷ Even if the Board chooses to award relief in *ABF* circumstances (a choice I would not make), it should not extend *ABF* to the more egregious circumstances here.

⁷Contrary to the contention of my colleagues, the denial of reinstatement and backpay to a discriminatee does not leave unlawful conduct unremedied. A cease-and-desist order protects against future misconduct and a notice assures employees that their rights will be protected.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees or otherwise discriminate against them because they have engaged in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Earley Mae Wallace immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed, and WE WILL make her whole for any loss of earnings and other benefits resulting from her unlawful discharge, with interest.

WE WILL remove from our files any reference to our unlawful discharge of Earley Mae Wallace, and WE WILL notify her in writing that this has been done and that her unlawful discharge will not be used against her in any way.

Grace Speer, Esq., for the General Counsel.

J. Gregory Grisham, Esq. and *Jeff Weintraub, Esq.* (*Weintraub Robinson Weintraub & Stock*), of Memphis, Tennessee, for the Respondent.

Donneth Wright, of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. These consolidated cases were tried in Memphis, Tennessee, on January 30 and 31, 1992, March 30 and 31, 1992, April 1 and 2, 1992, and August 10 and 11, 1992.¹ The Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board (Union) filed a charge in Case 26-CA-14700 on September 11, 1991,² and it filed a charge in Case 26-CA-14759 on October 22. As here pertinent, the Regional Director for Region 26 on November 29 issued an order consolidating cases and a consolidated complaint. General Counsel's Exhibit 1(k). The complaint alleges that Earle Industries, Inc. (Respondent collectively) committed unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by discharging its employee Linda Cummings on March 15, by suspending its employee Wallace on October 7, and by discharging Wallace on October 8. Respondent denies violating the Act.

On the entire record in this proceeding, including my observation of the witnesses and their demeanor, and after considering briefs filed by General Counsel and the Respondent, both on September 30, 1992,³ I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, which is a corporation with an office and place of business in Earle, Arkansas, is engaged in the manu-

¹ The third session of the hearing herein was originally scheduled for May 26, 1992. Counsel for General Counsel and Respondent's counsel filed a motion requesting a postponement and rescheduling of the continued hearing to the month of August 1992, pointing out that the Region was currently investigating charges against the Respondent in other cases which assertedly were related to the pending litigation, and that the parties were actively pursuing settlement of the pending litigation. While the involved Union and the attorney for one of the alleged discriminatees, Earley Mae Wallace, were served with a copy of the motion, see Appendix A, no one objected to the postponement and rescheduling, and the request was granted.

² All dates refer to 1991 unless otherwise indicated.

³ The date for filing posttrial briefs was extended at the request of one of the parties. The letter granting the extension, App. B, does not note that the request was being granted notwithstanding some objection. In other words, it appears that the involved Union, which did not file a brief herein, did not object to the extension by the Chief Administrative Law Judge to September 30, 1992.

facture of closet accessories. The complaint alleges, the Respondent admits, and I find that at all times material herein, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Facts

As here pertinent, Respondent's employee handbook, General Counsel's Exhibit 31, contains the following language:

THIRD PARTY INTERFERENCE

We firmly believe that all employees are members of the same corporate family which can solve its problems by communicating directly and openly with one another. We do not believe that third parties (unions) help to promote good employee relations here at Earle Industries.

Wages and Benefits are a result of our ability to make and sell quality products at a competitive cost. We believe a union would interfere with these goals and would hamper our plans for continued growth. It all comes down to the fact that we need each other. If we work together in harmony, achieve our personal and corporate goals and realize the profits necessary to the future of our company, all of us will benefit.

Peter Felsenthal, who has been associated with Respondent since 1981 and who is currently its senior vice president, testified that he was involved in the drafting of this language.

Cummings, who was a trial-period operator, testified that she was aware of the fact that the company had a 90-day probationary period and since she was hired on July 16, 1990, her probationary period should have ended on October 15, 1990, but it was extended a number of times.

When called by counsel for General Counsel, Louise Eskridge, who is the supervisor of Respondent's Tops and Bottoms department, testified that about the middle of January she moved Cummings from the machine she had been using to another machine; that the machine to which she moved Cummings broke down "but no more than any other machine"; and that Cummings complained to Eskridge about the machine. When asked if she, Eskridge, refused to move Cummings to another machine, Eskridge testified that she never remembered Cummings asking her to move to another machine. Subsequently, Respondent's employee, Isabell Thompson, was assigned to the involved machine. After working with the machine, Thompson wrote to Eskridge, among others, requesting that she be taken off the machine. In her letter, General Counsel's Exhibit 3(j), Thompson notes, "I did not make production this past week due to the fact that the machine I moved to was not working right most of the time. Also, it is much slower." Thompson went on to indicate in the letter that this was the first time that she had not made production since the second week that she was employed at Respondent. Eskridge testified that she never read the letter. Also, Eskridge testified that she removed Respondent's employee Johnnie Selvy from the involved machine to another machine because she believed the other machine was a better machine.

When called by Respondent, Eskridge testified that Cummings was moved to the second sewing machine around the third week in January, after Mae Lee Reddick became Eskridge's assistant; that Cummings had many repairs every now and then; that Cummings had a poor sewing technique and was not able to reach production during the 8 months that she worked for Respondent; that she moved Cummings to the second sewing machine hoping that it would motivate Cummings in that she would be next to Mary Smith who was just beginning to start to make production; that she had moved Mary Smith and Eunice Williams previously for that reason; that she thought that she moved Cummings before the union campaign started; that she thought that she first became aware of union activity in February after Cummings was moved; that she counseled Cummings many times about her repairs; that she was sure that Reddick also counseled Cummings; that Cummings complained about the second sewing machine and she also complained about the first sewing machine; that when Cummings complained she, Eskridge, would check out the machine and if it was a mechanical problem she would call mechanic Tom Corbett; that Cummings also had problems with needles breaking and minor adjustments on the tension which was something that she, Eskridge, could fix; that if there is a mechanical problem with the sewing machine she moves the operator to another sewing machine and calls a mechanic; that she could not recall a time when Cummings was not moved to another sewing machine when repairs were being made on the sewing machine she was originally using; that Cummings' second machine did not experience more mechanical problems than the other sewing machines; that she would counsel Cummings on her technique every time she went over to Cummings; and that, after the counseling, Cummings did pretty good at first but eventually she would regress to her old technique. Eskridge further testified that Cummings' machine did not break down every day; that Isabell Thompson used Cummings' second machine for a while but because Respondent was changing the size of the binders used and, therefore, was changing the folder on the sewing machine there were problems, initially, adjusting the folder and Thomas became frustrated and did not want to sew on the machine; that she did tell Wallace not to move Cummings to another machine just as she had told all the floor girls not to move the operators because the floor girls did not know what was wrong with the machine and supervisors were not off the floor that long that they, operators, could not wait; that this has always been Eskridge's policy and it did not change during the union campaign; that none of the floor girls had any experience in sewing; that the policy of moving operators to another machine when their machines break down did not change during the union campaign but she, Eskridge, recalled one instance when floor girl Samantha Moody moved Cummings and she, Eskridge, said something to Moody about the fact that floor girls had been given instructions that they were to check with either her, Eskridge, or Reddick before moving any operator; that Eunice Williams subsequently used Cummings' second sewing machine and she, Williams, was very productive; and that when she, Eskridge testified herein on August 10, 1992, Mary Stone was using the involved machine and she was producing between 22 and 24 dozen bags a day, which was described as very productive. On cross-examination, Eskridge conceded

that when she gave an affidavit to the National Labor Relations Board (Board) on October 4 she could not recall when she moved Cummings to her second machine.

According to the testimony of Reddick, who, as noted above, is assistant supervisor in Respondent's tops and bottoms department, Cummings was moved to her second machine in the third week in January. Reddick testified that she was positive about this. She had been made assistant supervisor in the tops and bottoms department on January 7. With respect to Cummings' work on the second sewing machine, Reddick testified that she had the opportunity to supervise Cummings and Cummings' job performance was very poor; that Cummings did "bad work"; that Cummings was slow in performing her job; that she showed Cummings how to sew and she observed Eskridge showing Cummings how to sew; that notwithstanding the counseling, Cummings performance did not improve; that Cummings complained about the second machine breaking needles and she, Reddick, called a mechanic; that once the thread broke on the second machine and Cummings was moved to another machine while the mechanic worked on the second machine; that she did not recall any other problems with Cummings' second machine; that the tops and bottoms department is never without a supervisor; that if a machine is not sewing properly the operator is moved to another machine and a mechanic is called; that to her knowledge that was the policy followed with respect to Cummings; that she did not know of any occasion when it was not followed; that that policy has not changed; that she did not see any indication of a union organizing campaign prior to Cummings being moved to the second machine; that she never heard anyone say that the second machine that Cummings worked on was a bad machine; and that she did not ever recall a time when Cummings was required to stand by her machine while it was being repaired except when a needle was being replaced. On cross-examination, Reddick testified that she never talked to Eskridge about what she believed Cummings' problems were; that she did tell Eskridge that Cummings did bad work; that she attended Cummings' performance meetings with Eskridge in January, February, and March and she was unable to explain why, if Cummings had bad sewing habits, she, Cummings, would have been rated good in the quality of her work in any of these evaluations; that Corbett was the mechanic she called to repair Cummings, machine and she called him a couple of times; that Cummings complained to her and Eskridge about the second sewing machine; that she was there when Isabell Thompson worked on the machine; that the folder on Thompson's machine was replaced with a wire one and they were having difficulty in adjusting the new folder; and that she was aware that Thompson wrote a letter requesting to be moved from that machine but she was not aware that the letter stated, "I made a terrible mistake and bad decision by moving. I did not make production this week, due to the fact that the machine I moved to was not working right most of the time." Reddick testified further that she did not discuss Cummings' performance with Eskridge before they both sat down and met with Cummings regarding her evaluations; and that Eskridge did not ask for any input regarding Cummings' evaluations before they met with Cummings to discuss the evaluations.

On January 26 Cummings signed a union authorization card. G.C. Exh. 6(a).

On January 29, Respondent held a meeting of employees at which the signing of union authorization cards was discussed.

On January 29 Eskridge gave Cummings a verbal warning, General Counsel's Exhibit 3(a), for having too many repairs. Eskridge testified that as far as she knew this was the first warning she had ever given to Cummings for work performed. Eskridge testified that she did not recall how many warnings she gave out on January 29 to employees in her department. Cummings signed her January 29 report of a warning. The warning notes that the employee had been previously counseled or disciplined for the same or similar reasons the prior and the same week.

Eskridge sponsored Respondent's Exhibit 25(c) which is an employee discipline report covering a verbal warning given to trial-period operator Marvella Brownlee for having too many repairs on January 29.

Also, on January 29 Cummings received an evaluation, General Counsel's Exhibit 3(f), in which she received "GOOD" for attitude, personality, cooperation, quality of work, skills, neatness, and relating to others. For productivity and motivation, Cummings received "FAIR." Eskridge and Cummings signed the evaluation. Thereon it was recommended that Cummings be retained and be reevaluated in 2 weeks. Her prior evaluations, General Counsel's Exhibits 3(c),(d), and (e), all contain "GOOD" checkoffs for everything but productivity for which she received a "FAIR" checkoff on each of her prior evaluations. The prior evaluations all indicate that Cummings trial period was being extended over production. Eskridge testified that Cummings productivity was increasing. The evaluation indicates that as of January 18 Cummings had reached a productivity level of \$5.30.

By memo to file dated January 31, General Counsel's Exhibit 40, Smith indicated that an employee meeting was held on January 30 in tops and bottoms. The body of the memorandum reads as follows:

Subjects discussed included the education of employees as to what they might be signing if they signed a card presented to them by a "union" representative. They were told that employees had made the company aware that such activity was present.

When asked on cross-examination by counsel for General Counsel if she recalled attending a meeting on January 30, Eskridge replied that she did not know when the meeting was held but she did remember attending the meeting.

In the end of January or the first of February, according to Cummings' testimony, she carried union authorization cards to work with her. Cummings testified that she spoke to a young lady about the Union and about signing an authorization card, and that the authorization card was hanging out of her wallet which was in her purse. According to Cummings' testimony, Eskridge saw it. Eskridge testified that she never saw Cummings with a union authorization card, sign a union authorization card, hand a union authorization card to someone else, hand out union material, or wear union clothing. Eskridge also testified that she never looked into Cummings purse and that she had no idea that Cummings was involved or even interested in the Union

until the flyer, which is described below, came out on the day of the election, March 8.

On about the first of February, according to Cummings' testimony, she was moved to a sewing machine other than the one she had been using since she was hired. Regarding the machine to which she was moved, Cummings testified that it broke down two or three times a day; that she was not allowed to move to sew on another machine while they were repairing her machine; that she was told that the problem was not the machine but rather it was the worker; that she had to stand there and wait until they fixed her machine; that she complained to Eskridge who told her not to move to another machine; that her production dropped because she had to stand there and wait and was losing time, two or three times a day waiting for them to fix her machine; that once floor lady Samantha Moody moved her to sew on another machine and Eskridge, in Cummings' presence, told Moody "[w]hat did you move her for? You put her back. Don't nobody move nobody unless me or May Lee [Reddick] tell you to move her"; that she saw Wallace speak to Eskridge and then Wallace told her "[w]ell, I don't understand it, she won't let her move"; and that she was moved from her original machine after Eskridge allegedly saw the union authorization card in Cummings' purse. Cummings testified that other people who had used the machine to which she was moved also had trouble with it, namely Selvy, Debra Walker, and Rosemary Smith; and that the machine had a reputation in her department for breaking down. Cummings also testified that when Eskridge moved her to a different sewing machine Eskridge did not give her a reason for the move and Eskridge did not say that she was being moved to help her increase her production. According to Cummings' testimony, Eunice Williams at some point in time worked on the machine to which Cummings was moved. Selvy worked on the machine just before Cummings was moved to it. And Walker worked on the machine when they were repairing her machine. Cummings testified that her old machine seemed like it was a lot faster than the machine to which Eskridge moved her.

With respect to Cummings being moved to another machine on or about February 1, Samantha Moody, who, as indicated above, was a floor girl at the time, testified that the machine to which Cummings was moved was located directly in front of Eskridge's desk; that it was in row four; that Cummings had problems with the machine in that it kept breaking down; that Cummings told Eskridge all the time; that Eskridge would tell Cummings to wait and that she would be over there in a little while; that she would ask Eskridge if she could move Cummings and Eskridge would say no that she, Eskridge, would let her know when she could move Cummings; that employee Irma Greenhall had problems with that same machine; that once she moved Cummings to another machine when Cummings' machine broke down and Eskridge was not around; that Eskridge, upon her return, told Moody that she was not supposed to move Cummings and that she should move Cummings back to her machine which was still broken; that the machine broke down almost every day; that Cummings would report the breakdown to her and she, in turn, would report it to Eskridge; that at times Eskridge would not be around and when she located Eskridge in the back or up in the office it would take Eskridge 15 to 20 minutes to get over to the

machine; that when Eskridge's assistant was around, she, Moody, would tell the assistant; that a mechanic was called to work on the machine almost every day; and that even after he worked on the machine it did not operate properly and he would have to be called back.

Wallace testified that about the middle of February Cummings was moved to a different sewing machine; that everybody who sewed on the machine had trouble with it; that employees who had trouble with the machine included Isabell Thompson, Rosemary Smith, Virgil Wright, Lucinda Johnson, and Johnnie Selvy; that prior to the union campaign, when an employee had a problem with their sewing machine and the mechanic could not get to the sewing machine, the employee was moved to another sewing machine if one was available; that after the union campaign started, if the employee asked to be moved, Eskridge would say "[d]on't move them, its not the machine, its the operator"; that Cummings was moved to the problem sewing machine after she solicited Barbara Jackson to sign a union authorization card while Eskridge was in the immediate area; that she did not recall exactly how many days it was after Cummings showed Jackson the authorization card that she, Cummings, was moved to the problem machine; and that once when the problem machine broke down on Cummings two or three times one morning she, Wallace, went to Eskridge and asked Eskridge if she, Wallace, and Samantha Moody could move Cummings and Eskridge said "[y]ou'd better not move her, I mean you'd better not move her." Wallace testified that Cummings was taking her break when she spoke to Jackson about signing a union authorization card. On cross-examination, Wallace testified that before the union organizing campaign when someone's machine broke down, that person was moved to another machine if one was available; that after the union organizing campaign began, if someone machine's broke, Eskridge told Wallace and the others responsible for moving sewers to another sewing machine, that they could not move anybody unless they first obtained Eskridge's permission; that before the union campaign Wallace and the two other floor girls, namely Samantha Moody and Burnette Glenn, were allowed to move sewing machine operators without Eskridge's prior permission regarding each individual instance; and that Eskridge never told her that there had been a problem with the floor girls moving some of the operators to different machines. Regarding Cummings showing a union authorization card to Barbara Jackson, Wallace testified that she saw Eskridge looking at Cummings and Jackson; that Cummings showed the union authorization cards to her, Wallace; and that she assumed that they were the union authorization cards she had given to Cummings. Wallace testified that after the solicitation, Cummings was moved to a sewing machine on the third table by Eskridge and she, Wallace, did not know what the reason was for moving Cummings around the middle of February; that for about 2 months Eunice Williams worked on the machine to which Cummings was moved sometime before she, Williams, quit; that Williams sometimes had problems with the machine; that she could not recall whether Williams had a lot of problems with the machine; that she did not know whether Williams met her production goals; and that Cummings was moved from the fourth line to the third line.

Mary Smith testified that Cummings had problems with her machine and when she told Eskridge about having prob-

lems with the machine sometimes Eskridge would move her and sometimes she would not; and that every time an operator is moved because the machine she was working on breaks down, the operator loses production because bundles have to be moved to the new machine and if a floor girl is not available, the operator has to move the bundles herself.

Respondent's employee Betty Williams, who has worked for Respondent for 3 years as a sewing machine operator in tops and bottoms, testified that Cummings had problems with the sewing machine and she called Eskridge two or three times a day indicating that the thread was breaking or the machine was skipping and that Cummings had problems with the machine two or three times a week. On cross-examination, Williams testified that it is possible that the supervisor was able to make a minor repair to the machine when she was called and that not every repair to the machine requires a mechanic.

On February 18 Cummings received an evaluation, General Counsel's Exhibit 3(g). Cummings signed the evaluation, which contains all "GOOD" checkoffs except for productivity and motivation which are checked off "FAIR." On the evaluation it is indicated that Cummings would be retained and be re-evaluated in 2 weeks. The evaluation indicates that Cummings production was at a \$5.14 an hour level and that she was expected to attain a \$5.60 level and hold it.

On March 1 Cummings was evaluated by Eskridge, General Counsel's Exhibit 3(h). Cummings did not sign the evaluation. She received "FAIR" checkoffs for attitude, personality, productivity, skills, motivation and relating to others, while receiving "GOOD" check-offs for cooperation, quality of work, and neatness. The evaluation notes that Cummings' productivity level was \$4.98 an hour, and it was recommended by Eskridge that Cummings not be retained.

With respect to Cummings March 1 evaluation, Eskridge testified that she did not discuss this evaluation with Cummings because during that time there was a lot of campaigning going on and she had to put off a lot of paperwork. Eskridge did not recommend retaining Cummings because her production rate had regressed. Eskridge testified that this was not the first time that she recommended that an operator's trial period not be extended.

On March 7 the Respondent held a meeting of the employees. Eskridge attended. She observed Cummings taking notes during the meeting. And she heard Cummings question Felsenthal about certain statements he had made regarding various plants that had closed because of union activity. When called by counsel for General Counsel, Eskridge testified that there were "Vote No" buttons in a box at this meeting and people could pick them up if they wanted one. Initially Eskridge testified that she was not in a position to observe whether employees took the buttons. When it was pointed out to her that her Board affidavit states "I could see who got the buttons and who didn't," Eskridge testified "[i]t seems like to me I remember saying that I could not see who got the buttons." After this morning meeting, the employees returned to their work area. Eskridge testified that she went to the work area and asked Cummings and another employee, Mary Smith, "if the Union had promised them jobs, even if they didn't make production." Employees Betty Lou Williams, Samantha Moody, and others were present. Williams said that she was making production. Eskridge told Williams that she was not talking about her, Williams, or

Moody. Eskridge testified that she thought Williams was being very disrespectful since she, Eskridge, was not talking to her. Eskridge testified that Respondent has a progressive discipline system which is comprised of a verbal warning, two written warnings, a suspension, and termination; and that it applies to attendance, insubordination, and production. According to Eskridge, the progressive discipline policy does not apply to new hires. Eskridge gave Cummings a verbal warning on March 7, General Counsel's Exhibit 3(b) for insubordination. The memorialization of the warning indicates that "Linda was screaming and talking back with a very bad attitude, being very disrespectful to her supervisor and unruly." Cummings did not sign in the designated box indicating that she had received a copy of the report regarding a warning. Eskridge testified that while she talked to Cummings about the warning, Cummings never did see the memorialization of the warning. Eskridge did not give Williams a warning regarding what occurred on March 7.

Regarding the March 7 employee meeting, Cummings testified that the meeting was held in the lunchroom; that present for the Company were Eskridge, Reddick, Felsenthal, and Gary Smith, who is Respondent's personnel director; that she took notes at the meeting; that she asked Felsenthal, who had indicated that a unionized company in Marked Tree, Arkansas, had closed down, what the name of the company was; that there were boxes of buttons on tables by the doors which are used to exit from the lunchroom; that the buttons said "Pro-Union," "Speak for Yourself," "Vote No," and "Unity No Union"; that Eskridge was at one of the tables; that she, Cummings, did not take a button; and that Eskridge could see her.

With respect to her discussion with Eskridge on March 7, Cummings testified that after leaving the aforementioned employee meeting at about 9:30 a.m. she returned to her work station. Cummings gave the following testimony with respect to what occurred next:

A. Well, I was sitting down getting prepared to start sewing, and me, Mary, and Betty Lou, and Barbara Jackson were sitting there, and Louise [Eskridge] walked up and said. "Excuse me, I would like to ask you and Linda something, Smith, Mary," and I didn't say anything, I just kept getting my stuff out of my drawer, and she said, "What makes you think the union is going to keep your job," and Mary said, "Well, answer me this"

. . . .
And Mary said, "Let me ask you this. How come every time we have questions, we have to go to Gary and not to Felsenthal himself?" She said, "That is not what I asked you." She said, "Well, you asked me a question and I asked you a question, 'How come we can't talk to Felsenthal?'" She said, "Well, I have nothing to do with that," she said, "but I still ask you, what makes you think the union is going to keep your job?"

So, Betty Lou stood up and she said, "Well, Louise, the company don't promise you no job"

. . . .
So, Betty Lou said, "You know, the company don't promise you a job." She said, "Betty Lou, I wasn't talking to you." So, Betty Lou sat down.

She said, "Do you hear me," and I said, "Louise, I haven't said anything to you." She said, I still asked you a question, "What makes y'all think the union is going to keep your job?" I said, "Like she stated, the company don't promise you a job," and so she said, "Well, you need to be quiet and think about your production, because neither one of you are making production."

So, Mary said, "I can make the production." So, I said, "Well, Louise, what is production?" and she said "Seven to eight bundles, it depends on what you're sewing." I said, "Well, I've been doing seven and eight, but I maintain seven more than I do eight." She said,

"Well, you need to work on that," she said, "because I seen Mary was making it, but I don't see you, I'll have to check on that."

I asked, I said, "Well, why do you talk to people the way you do, don't nobody talked to you and holler at you the way you holler at people." "You don't tell me what to do, I am grown," and started pointing her finger. I said, "You don't have to point your finger in my face either," and then she said, "Well, look, you can get up and walk off." I said, "I'm not walking out nowhere, you fire me before I leave."

So, Samantha said, "Linda, shut up, you're saying too much." She said, "Shut up before you say too much," and Louise said, "You've already said too much," and she walked away.

She went to her desk and started writing down something, and she came and gave me a piece of paper to tell me about my production, what I was supposed to be making.

Cummings testified that when Eskridge said you can get up and walk off right now, she was pointing towards the exit door; and that Eskridge had never come up to her before when she was in a group and discussed her production but rather in the past she had always been called to the lunchroom for a discussion of her production. On March 7 Cummings, according to her testimony, wore a union pin. She testified that she did not wear union pins or insignia prior to March 7 and that she did not speak up or say anything about the Union prior to the day of the election, March 8.

Regarding the March 7 verbal exchange between Eskridge and Cummings, Wallace testified that earlier that day during the captive-audience meeting, Cummings asked Felsenthal questions and then she and Mary Smith kind of snickered; that after Cummings returned to her work area she, Wallace recalled seeing Eskridge standing at her desk with her arms folded looking over at Cummings and Smith; and that the next thing she knew Eskridge and Cummings were arguing and Eskridge, who had her finger in Cummings face, said to Cummings that the Union could not protect her job. Wallace also testified that when Eskridge put her finger in Cummings' face, the latter was crying. Wallace was about 8 feet away from Eskridge and Cummings during this exchange. She, Wallace, testified that at one point Eskridge said "can the Union guarantee ya'll a job." According to Wallace's testimony, Cummings was not wearing a red union T-shirt at the time.

With respect to the verbal exchange between Eskridge and Cummings on March 7, Samantha Moody testified that Cummings was wearing a union T-shirt that day; that Eskridge approached Cummings loudly indicating that Cummings was not getting her production out; that Eskridge stuck her finger in Cummings' face and Cummings stood up and loudly said, "Louise, both of us is grown, and here you ain't got to be doing that"; and that Cummings hit the table with her hand as she was standing up.

Regarding the March 7 verbal exchange between Eskridge and Cummings, Glenn, who has been employed by Respondent for 9 years and is a floorperson, testified that she saw Eskridge with her finger in Cummings' face; that Eskridge was showing Cummings something in a folder; that Eskridge told Cummings that she could get up leave; that Cummings said, "I'm not going to do that. That's what you want me to do"; that Eskridge then said to Cummings "you might as well because I'm going to see to it"; and that Eskridge, at that time, pointed toward the exit which the employees used.

Mary Smith testified that on March 7 she and Cummings returned from an employee meeting to their work stations; that Eskridge walked up to them and said, "well, Mary, do you and Linda think that the Union could help you—all keep you—all's jobs"; that Eskridge then said "you know you're not doing production"; that she told Eskridge that she was doing her production; that Betty Lou started to say something and Eskridge told her to shut up that she, Eskridge was not talking to her; that Cummings said that she thought she was making her production; that Eskridge showed Cummings a piece of paper and said that Cummings was not making her productions; that Eskridge shook her finger in Cummings' face and that is when Cummings got mad; that the employees in the area told Cummings to be quiet and Eskridge said that she, Cummings, had already said too much; that Eskridge had never discussed her production with her on the floor like that before; and that Eskridge has never discussed Smith's production with her on the floor like that since this incident. On cross-examination, Smith testified that when Eskridge started pointing her finger in Cummings' face, Cummings started to stand up but Smith did not believe Cummings stood all the way up because the employees in the area told Cummings to sit down; that on that particular day she, Smith, was wearing a union red T-shirt and Cummings was not wearing a union red T-shirt, but Cummings was wearing a union button that she had borrowed from someone else; that this was the first time that she, Smith, wore a union red T-shirt and she thought that this was the first time that Cummings had worn a union button; that she did not hear any rumors circulating at that time which related to making production; and that this was the only time that Eskridge ever discussed production with her while she was at her sewing machine.

Betty Williams testified that she witnessed the verbal exchange between Eskridge and Cummings on March 7. According to Williams' testimony, at one point Eskridge said "do you think the Union going to save you're job." At this point, according to Williams' testimony, she said that neither the Union nor the Company could save the employees' jobs but rather the employee could save the job only if she was meeting production. Eskridge then told her "shut up because this don't concern you." Williams testified that when Cummings told Eskridge that she should not talk to her

like that and that she, Cummings, was grown just like Eskridge, Eskridge said, "well, you can go out the door." Williams also testified that Eskridge pointed her finger in Cummings' face and that when she, Williams, told Cummings to be quiet before she said the wrong thing, Eskridge said "she's already said the wrong thing." With respect to Eskridge discussing production with employees at their sewing machine, Williams testified that it had never occurred before. On cross-examination, Williams testified that she was a union supporter; that during the verbal exchange between Eskridge and Cummings, when Cummings got up she hit her fist on the table when she said "wait a minute. You don't talk to me like that. I'm just as grown as you are"; that Eskridge told Cummings that she could leave; that she and Mary Smith were wearing red union T-shirts; that Cummings did not have on a red union T-shirt but she was wearing a union button which Williams gave her; and that both Mary Smith and Cummings had worn union T-shirts before March 7. On redirect, Williams testified that the involved union T-shirts were provided by the Union about a week before the election. And on further cross-examination, Williams testified that she thought she saw Mary Smith, Cummings and others wear red union T-shirts more than a week before the election.

Respondent's employees Margaret Davis and Joy Chase testified that union T-shirts were first handed out the day before the election, March 7.

Regarding the March 7 incident between Eskridge and Cummings, Gary Smith testified that he authorized Eskridge to issue the discipline to Cummings for insubordination and he was aware that the conversation referred to in this warning was initiated by Eskridge asking Cummings if she thought that the Union could help her keep her job.

When called by Respondent, Felsenthal testified that on March 7 Eskridge told him and Gary Smith that she was concerned that the trial-period operators were being told that if they did not get the Union in, they would loose their jobs because they were not producing. Felsenthal interpreted this to mean that the only way for the trial period operators who are not producing to keep their job would be to have the Union in. Felsenthal testified that he told Eskridge that he wanted the employees to understand that union or no union, they would have to produce and he asked Eskridge to check with the trial-period operators who are not producing and to find out if in fact this is what they were being told. On cross-examination, Felsenthal testified that he did not recall Cummings taking notes at the employee meeting; that there may have been some employees taking notes but he did not know Cummings by face; and that Eskridge's testimony at the hearing herein in his, Felsenthal's, presence that Cummings asked him during the employee meeting what plant he was talking about when he mentioned that one had closed in Marked Tree did not jog his memory. Felsenthal also testified on cross-examination that Gary Smith was present when he had his conversation with Eskridge about talking to probationary employees with respect to whether they would have to make production if the Union was certified; that Smith might have asked Eskridge to go out and take care of it; that he could not place the time of day when he had this conversation with Eskridge and Smith; and that he did not remember if this conversation occurred in his office or if it occurred in the lunchroom after a meeting.

According to Assistant Supervisor Reddick's testimony, on March 7 neither Cummings nor Mary Smith had on any union paraphernalia.

With respect to her verbal exchange with Cummings on March 7 and the subsequent warning to Cummings, Eskridge, when called by Respondent, testified as follows:

Q. Would you tell us what prompted this write-up?

A. Well, I heard rumors that they had—the newer employees had been intimidated by some of the union supporters, and what I was hearing was that they were telling them that if they didn't reach production, you know, "If you don't reach production, they're going to get rid of you if you if you don't get this union, if you don't take—vote this union in," or whatever.

And I talked to Peter about it, and he asked me to go, you know, and find out if anybody was bothering them, you know, or had they been intimidated.

And so, I went over to her, and I asked them, I said, "Did the Union tell you that if you didn't make production, you were going to lose your job?" and Mary Smith said, "No."

Then by that time, Samantha Moody jumped in, and she said, "Well, they're making production," and I said, "Oh, no," I said, "Mary may be right now," I said, "but Linda is not," and Linda started yelling and screaming and saying a lot of jibber-jabber and telling me don't play with her, and I couldn't even—she was going on so, until to tell you the truth about it, I couldn't even get sense into her, to understand what she was saying, she was going on so about.

At this point, did you direct any comments toward her?

Yes. She had got me kind of upset, because I was trying to ask Linda, "Linda, what are you saying?" you know, "What are you talking about," and she wouldn't never calm down enough for me to understand, and by that time, Samantha Moody and Betty Williams, and some of the other girls that was on the table, was telling her, saying, "Linda, shut up, shut up, Linda, shut up, Linda, you talk too much, you're talking too much, you're talking too much," and she really just made—I got upset with her, and I turned and I said, "That's all right, let her talk on," I said, "she already talked too much."

Okay. When you made that comment, what were you referring to?

I was referring to only that I was going to write her up.

Eskridge testified that during her verbal exchange with Cummings on March 7 she did not know if Cummings or Smith were union supporters. Further, Eskridge testified that the rumors that she heard related to threats that non-trial period operators were receiving; that she thought there were only two trial-period operators at the time, Cummings and Smith; that she did not learn that Cummings was a union supporter until she saw a flyer with Cummings' picture in it, and she thought the flyers were handed out the day of the election but she was not sure; and that she did not tell Samantha Moody that Cummings was for the Union.

With respect to the March 7 employee discipline report regarding the verbal exchange between Eskridge and

Cummings, Eskridge testified, when called by Respondent, that she did not have Cummings sign the report because it is not mandatory to have the employee sign it; that she discussed this incident with Cummings 2 or 3 days after it occurred, telling Cummings that she, Eskridge, was going to give her, Cummings, a verbal because she had screamed and she was being insubordinate; that during this exchange she, Eskridge, did not point to the door and tell Cummings to leave; that she did not tell Cummings that she might as well be leaving; that she did not point her finger in Cummings' face; that at the time she was 5.5 to 6 feet from Cummings; that she never told Cummings that she was going to get her; and that neither Cummings nor Smith had any kind of a union button or union clothing on that day. On cross-examination, Eskridge testified that she was motivated to speak to Cummings and Smith because she had heard rumors that they had been intimidated by people who were going around saying that if they did not vote for the Union and get the Union in that they were going to be fired; that she discussed this with Felsenthal after the employee meeting that day and before she spoke with Cummings and Smith; that she told Felsenthal that some of the people were going around telling the new employees that they were going to be fired if they did not vote the Union in and Felsenthal told her to "let them know that their job wasn't in jeopardy. You know, to find out"; that the rumor she heard only related to probationary employees and she did not know to what extent the rumor related to the probationary employees' production; that she asked Cummings and Smith if anybody had been intimidating them, telling them that they were going to get fired if they didn't make production; that her October 4 affidavit to the Board indicates that she asked them if the Union had promised them their jobs if they did not make production; and that this exchange occurred close to 24 hours before the election. Eskridge further testified on cross-examination that she recalled Cummings taking notes at the March 7 employee meeting and asking about different plants which were open or closed. Also on cross-examination, Eskridge testified that when she went to speak to Cummings and Smith about the rumor, she did not talk to Brownlee about the rumor; that she thought Brownlee may have quit by that time or she was on medical leave and she, Eskridge, was not sure that Brownlee was even there at that time; that since Respondent's records namely Respondent's Exhibits 25(a), (b), and (c) indicate that Brownlee received warnings on January 29 and March 13 and 21, apparently Brownlee was there; that she did not speak to anyone else after Cummings and Smith because of the commotion when she did speak with Cummings and Smith; that after speaking with Cummings and Smith she told Felsenthal what happened; and that at that time Felsenthal "didn't tell me to bother anybody else." On redirect, Eskridge testified that Felsenthal did not tell her to speak to Cummings and Smith but rather she spoke to them because they were the closest probationary employees to her desk and Brownlee was sitting further from her desk than Cummings and Smith.

Gary Smith sponsored Respondent's Exhibits 40, 41, and 42 which demonstrate with respect to six specified employees, other than Cummings, that the employees did not sign employee discipline reports or employee evaluations, notwithstanding the fact that there is a box or a line for such employees' signatures.

On March 8 a leaflet, General Counsel's Exhibit 6(b), was, according to Cummings' testimony, handed out to employees as they came into work. The leaflet contains the pictures of a number of individuals with a written statement and a written name next to the picture. The following statement appears next to Cummings' picture: "I want to be treated fairly. This is not asking too much. I know the company can treat us better. I'm voting yes."

Eskridge, on March 8, saw the paper containing Cummings' picture and indicating that Cummings supported the Union.

On March 11, according to Cummings' testimony, Eskridge, during a discussion of Cummings' evaluation, told her that she was having too many repairs and that everything else was okay.

Regarding repairs made on March 11 and 12, Eskridge testified that she recalled that employee Beverly Burford was given the wrong bindings but she, Eskridge, could not recall if Burford received the wrong bindings on those 2 days.

On March 13, Cummings received a verbal warning from Eskridge, General Counsel's Exhibit 3(i), for having too many repairs on March 11 (the first workday after the March 8 election) and March 12. The report of the warning indicates that Cummings said that this was the same as sewing on wrong binding and Eskridge indicated it was not and there was a difference between bad work and wrong binding. The report goes on to note that "failure to improve could result in further disciplinary action including termination."

Regarding her March 13 warning, Cummings testified that she signed it; that it was for too many repairs on March 11 and 12; that the repairs were caused by the fact that the supervisor gave Reddick the wrong binding; that the binding was for a special order and it was not the regular binding that she used all the time; that Reddick gave the wrong binding to her and another sewer, Beverly Burford; that her production slowed down because she was required to do all of her repairs herself; that Wallace started to help her with her repairs but Eskridge stopped Wallace indicating that Cummings would have to make the repairs herself; that Eskridge and Reddick made Burford's repairs; that normally when a repair is not the fault of the sewer, the supervisor usually will make the repair; that these repairs were not her fault; and that Burford's production was not impacted. Cummings testified that in the past she has made repairs on work where she was at fault.

Regarding Cummings' March 13 warning for repairs, Wallace testified that she recalled that the week after the election Cummings and Beverly Burford had some repairs; that she was sure that Burford had repairs because she looked at the number on the bag of items to be repaired and the number was Burford's; that Eskridge, Reddick, and Lavelle Pikey repaired Burford's work and Wallace believed that Burford did not even know that she had these repairs; that Cummings did her own repairs; that she, Wallace, and Samantha Moody started to rip out Cummings' repairs since they were not real busy and Eskridge told Wallace and Moody to let Cummings do them since she messed them up"; that the repairs took Cummings twice the time that it would have taken her to do a bundle and so her production was impacted; that she was not aware of Burford receiving any discipline for her repairs that week; that the bundles had to be repaired because the items had the wrong binding on them; and that Reddick,

Eskridge's assistant, was responsible for choosing the binding that was used. On cross-examination, Wallace testified that the week of Cummings' discharge she had a bundle of repairs which Eskridge brought back to her, Cummings, telling her that the wrong binding was on them; and that Reddick said that the wrong bindings were used on Cummings' bags. Eskridge testified that she did not recall Wallace asking to assist Cummings with her repairs; that Wallace was not assigned to Cummings but rather Samantha Moody was assigned to Cummings and that she never told Wallace not to assist Cummings in making repairs.

With respect to the repairs for which Cummings received a warning on March 13, Reddick testified that these repairs did not relate to Cummings being given the wrong binding; that the repairs were occasioned by Cummings' poor sewing technique; that she ripped some of the repairs out so that they could be redone; that she did not know if anyone else helped with the repairs that day; that she did not know how many bags had to be repaired; that Cummings had almost a bundle of repair work come back; that the week before these repairs Cummings had been given the wrong binding and on that day she, Reddick, repaired all six of the bags which were involved; that under the Company's policy if a trial period operator is given the wrong binding she, Reddick, is responsible for making the repairs; and that the company's policy with respect to repairs is that the operator is allowed to make five repairs a day and that the operator is required to make their own repairs.

When called by Respondent, Eskridge testified that one of the reasons Cummings was a low producer was the fact that she had repairs; that supervisory personnel in the tops and bottoms department do help out with repairs; that it is Respondent's practice to give some of the repairs back to the trial-period operators so that they are aware of their mistakes; that this policy was followed with respect to Cummings; and that to her knowledge, Cummings was never forced to make all of her own repairs.

With respect to the March 13 warning to Cummings for too many repairs, Eskridge testified that Cummings had about 23 or 24 bags coming back in 1 day for repairs and about 20 the next day; that Cummings signed this warning and when Cummings signed this warning the only comment she made to Eskridge was that she, Cummings, was "trying"; that she could remember one time when Cummings might have received the wrong binding and the mistake was caught by the assistant supervisor after Cummings sewed about five bags; that Cummings was not penalized when she was given the wrong binding and that incident occurred sometime in February; that Cummings made some of the March 11 and 12 repairs and some of the repairs were given to another operator, Pikey, who handles repairs; and that she and Pikey sewed over half of the repairs.

Eskridge sponsored Respondent's Exhibit 25(a) which is an employee disciplinary report for trial-period operator Marvella Brownlee. The report speaks to a written warning that Brownlee received on March 13 for having too many repairs on March 11 and 12. The report goes on to state "Marvella's response was not to even be in the room talking and that all her repairs were because of machine trouble. She had a very angry and bad attitude. We tried her machine and every thing was o.k."

On March 15 Cummings was terminated. She testified as follows regarding her discharge:

A. Well, I had worked all day and at 3:00, it was about 3:00, Louise Eskridge walked up to me and she said "Linda, we need to see you . . ." that Gary wanted to see us in the office.

So, I went into the office, and I sat down—No, I came in, and he said, "You have a seat," and I sat down.

He said, "Well, Ms. Cummings, we have tried you and we've tried you again, but you're just not getting any better, you're having too many repairs, and it's not . . . you seem to start going backwards." I said, "Well, I've been having trouble with my machine." I said, "it breaks down two or three times out of the day," and he said, "Well, I have no report of you having trouble with your machine. You're just not getting any better, we can't keep you no longer, we'll have to let you go."

And I said, "Oh, well." I said, "well, it was nice working with y'all while it lasted," and he said, "You have nothing to say," and I said, "No," and they gave me my check and I left.

Subsequently, Cummings testified that she was told that she could come and apply for a job if Respondent was hiring. Cummings testified that when she began her employment at Respondent she was given a copy of a document similar to what was received here in and as Respondent's Exhibit 2. One of the paragraphs of Respondent's Exhibit 2 reads as follows: "[f]urther, if at the expiration of (30) weeks you have still not reached a productive level and have not shown adequate improvement, we will have no choice but to terminate your employment."

Regarding Cummings March 15 discharge, counsel for General Counsel called a former employee of Respondent, Willie Mae Starks, who testified that her supervisor at Respondent was Colleen Bonanno; that she worked at Respondent as a side seamer; that she never received any warnings for low production at Respondent; that she was never counseled by management at Respondent for low production; that in her October 15, 1990 evaluation she received excellent and good markings in all categories including performance; that the involved employee evaluation, General Counsel's Exhibit 4, shows that Starks received an excellent in productivity for the trial period ending October 22, 1990; that she was working up to production as a side seamer and on a few days she did make production; that she quit her job because she became pregnant and she was having trouble doing her job because of her pregnancy; and that she sent Gary Smith a note with respect to why she was quitting. General Counsel's Exhibit 15. On cross-examination, Starks testified that she never worked in the tops and bottoms department and she was never supervised by Eskridge. Starks quit Respondent in May 1991. At the hearing herein, counsel for General Counsel argued that the testimony of this witness and the exhibits sponsored by this witness go to disparity because Starks gave a specific reason to Gary Smith for quitting and that reason does not appear in her record. Also, counsel for General Counsel argued that this woman had a record of low

production, was never disciplined, and did not quit because of her low production.

With respect to Cummings termination on March 15, Gary Smith testified, when called by counsel for General Counsel, that generally when the employee's trial period is extended he sits down with the employee and the employee's supervisor and makes the employee aware of what their piece rate average is at that time, what average they are expected to achieve, and he asks the employee if there is any reason they are not making production; that prior to terminating an employee for low production he would have such a counseling meeting; that with the exception of the March 1 evaluation, on every evaluation of Cummings before that date, Cummings came to his office with Eskridge and he and Eskridge discussed the evaluation with Cummings; that he investigated why Cummings production slipped; that in the affidavit he gave to the Board on October 4 he indicated that he could not be sure he tried to find out why there was a drop in Cummings production between February 18 and March 1; that he could not remember whether he did investigate the reason why Cummings slipped in production between February 18 and March 1; that when an employee does have production problems, he generally notifies Eskridge and Eskridge will write back to him about the problem; that this was the procedure followed when Rebecca Knapp's production dropped because she was having problems with her machine in October; that there is no note to file in Cummings' file or a note from Eskridge in Cummings' file indicating that Cummings was having a problem with her machine; that Knapp's file also includes a note from Eskridge dated March 22 indicating that while Knapp was counseled for production being down for 2 weeks in a row, she was having extensive machine problems and had to move sometimes two or three times a day; that Knapp's file also includes a memo to file from Gary Smith dated October 8 indicating that Eskridge informed him that Knapp was having difficulties with the machine she was moved to while hers was being repaired; and that when an employee has problems with her machine it severely impacts on her production. Gary Smith also testified that normally an employee's production comes to him midweek of the following week; that the first union election was on March 8; that he directed Carolyn Beecroft, who does the payroll for Respondent, to make a summary of Cummings' production for the week of March 15 early; that normally he would not have received that report on Cummings until the next week; that on occasion he has requested Beecroft to give him the piece rates on a Friday at the end of the workweek; and that in his discharge interview with Cummings, he explained to her that he had considered the stress of the union campaign and he had tried to factor that in regarding lower production across the board of all employees.

When called by counsel for General Counsel, Eskridge testified, with respect to Cummings' termination on March 15, that generally when she reviews an employee evaluation she does it with the employee in the cafeteria; that usually she meets alone with the employee; that sometimes her assistant is present; that she fills out the employee evaluation and submits it to Gary Smith and Felsenthal for their input and subsequently she talks with the employee, usually in the cafeteria; that she does not always take the employee to Gary Smith's office regarding the evaluation; that during the trial

period if the employee is progressing she will take the employee to Smith's office for a motivational talk but she does take the employee to Smith's office every time she gives an evaluation; and that when she does take the employee to Smith's office it is documented and placed in the employee's record.

Regarding Cummings' March 15 termination, Felsenthal, when called by counsel for General Counsel, testified that he recognized a document dated September 27, 1985, which refers to Respondent's employee Dorothy Berry, which document indicates that he and Supervisor Glenda McCain spoke to Berry regarding her lack of production and Berry was advised that although she had been sewing for over a year, she had not yet met a productive level, and she had been counseled that she was going to be given one last chance to reach and maintain a productive level or else she would be terminated; that he believed that Respondent's probationary period policies back in 1985 were different with piece rate operators in particular than they are now; that he did not know whether Berry had previously completed a trial period; and that General Counsel's Exhibit 28 is a memorandum from Respondent's plant supervisor to Berry dated December 9, 1985, in which it is indicated that Berry had received a prior extension for 45 days on April 25, 1985, and an extension on June 10, 1985, to reach and maintain production level and that in December she had reached the production level.

With respect to the termination of Cummings, Corbett, who, as indicated above, works for Respondent as a mechanic, testified that he was familiar with the second sewing machine that Cummings worked on; that he did not remember Cummings' machine experiencing a large number of mechanic problems during January, February, or March; that he could remember working on the machine just once during the 3 or 4 mentioned months, when he adjusted the tension on the machine; that Cummings' machine required no more attention than the other machines in the tops and bottoms department; that he did not recall a time when Eskridge refused to move any operator while a machine was being repaired; that if an operator is having problems with her machine, the normal procedure is for the operator to tell the supervisor and the supervisor will call him; that he did not recall ever working on the first machine that Cummings used; that he was familiar with Isabell Thompson and she was a good operator who knows how to adjust the tension on her machine; that he knew that Thompson was moved to the second machine which Cummings used; that he was not aware that Thompson requested to be moved off that machine because her production dropped since she was incurring a lot of repairs and that machine was not working properly; that he was aware that Thompson was moved away from that machine within a week of being placed on it; and that if Eskridge did not tell him that Cummings was having problems with her machine, then he would not have known that she was having problems. On redirect by counsel for Respondent, Corbett testified that from time to time floor girls contact him and tell him that an operator is having some kind of mechanical problems with their machine and that he did not recall ever being approached by either Samantha Moody or Earley Mae Wallace with either one of them telling him that Cummings was having a problem with her machine. On further cross-examination, Corbett testified that he was not aware if Virgil Wright ever was written up for going

directly to a mechanic and asking him to fix the machine. On further redirect, Corbett testified that he did not recall Cummings ever coming to him and asking him to work on her machine.

When called by Respondent to testify regarding Cummings' March 15 termination meeting, Eskridge testified that the only statement made by Cummings regarding her low production was when she said, "I've done all I can do"; that no one at the meeting, which included Gary Smith, herself and Cummings, mentioned the Union; and that Cummings never achieved minimum production while she was working at Earle Industries.

With respect to the trial period of piece-rate operators, Gary Smith testified that it can extend up to 30 weeks and Respondent has had some that have gone 35 weeks; that to get out of a trial period the operator must maintain the minimum production for 4 weeks; that he does take into consideration any problems that a trial-period operator is having with the machine that the operator is using; that he has terminated trial-period operators who are not able to achieve minimum production; that Respondent's Exhibit 34(a) through (i) are the production summaries of specified employees who were hired in 1988, 1989, and 1990 and who were terminated because they could not meet minimum production; that one of the employees covered in Respondent's Exhibit 34 is the sister-in-law of Respondent's plant manager; that as demonstrated by Respondent's Exhibits 35 and 36(a), Cummings met the minimum production standard only once during her 35 weeks at Respondent; and that, as demonstrated by Respondent's Exhibits 36(b), (c), and (d) other employees, namely, Isabell Thompson, Mary Stone, and Eunice Williams, all used the involved sewing machine collectively either before or after Cummings was terminated and all of them were able to meet minimum production on the involved sewing machine.

Regarding Isabell Thompson's use of the involved machine, Gary Smith testified that, as reflected by Respondent's Exhibit 37, Thompson requested to be moved to the machine, she was not happy with the machine and subsequently she requested to be moved off the machine; and that a comparison of Respondent's Exhibit 36(c) and Respondent's Exhibit 37(c) demonstrates that contrary to her impression, Thompson was making minimum production on the involved machine.

When called by Respondent, Gary Smith testified, regarding the March 15 Cummings' termination meeting, that the Union was not discussed at this meeting; that at the time he had no personal knowledge as to whether Cummings was a union supporter; that the Union did not play any role in his decision to discharge Cummings; and at this meeting he told Cummings that she would be welcomed back at any time to fill out an application for a non-piece rate position if it became available; and that to his knowledge Cummings never subsequently applied for another position at Respondent.

With respect to Cummings' termination, Gary Smith testified, when called by Respondent, that in deciding to terminate Cummings he did not take into consideration her March 7 warning or her counseling regarding too many repairs on March 11 and 12. Also, Smith testified that at no time during Cummings' employment was he ever made aware of any information that her machine was broken or defective in any way; that Cummings never told him that her machine was

defective; that he did see Cummings' picture in the union flyer which was distributed on March 8; that the fact that her name and picture appeared in this document did not play any role whatsoever in his decision to terminate her; that he had never seen Cummings' union authorization card; and that Cummings still could come and apply for employment at Respondent for a non-piece-rate position.

Gary Smith sponsored Respondent's Exhibits 38(a)-(c) which cover a situation where a piece-rate operator was terminated in June 1990 for failure to meet minimum production, filed an application with Respondent for a plant position in July 1990 and was called in August 1990 and rehired by Respondent. Smith testified that other employees, namely, Sue Bradley and Martha Crawford, who were formerly piece rate operators who were discharged for not meeting production, were rehired by Respondent into non-piece rate positions. Smith also sponsored an exhibit, Respondent's Exhibit 39, which lists 43 employees who were hired between March 25, 1991, and July 30, 1992. The exhibit does not indicate the positions of those hired.

With respect to Respondent's policy regarding rehiring persons who had been terminated in the past, Felsenthal testified that Respondent has rehired such employees depending upon their record or their previous work history. Such rehires include individuals who previously were not able to meet production rates and they were subsequently hired into a non-piece rate position. Felsenthal also testified that between March 15 and the time he testified herein, April 2, 1992, Respondent had hired anywhere in the neighborhood of 75 to 100 employees.

General Counsel introduced a number of production records, General Counsel's Exhibit 18, and sewing repair records for the period January 2 through March 27, General Counsel's Exhibit 19. Gary Smith testified that Respondent did not have a list of the operator numbers for the period involved in General Counsel's Exhibit 19. Consequently, according to Smith, it is impossible to confirm who had repairs during the involved period of time based on the operator number. General Counsel also introduced certain of Respondent's business records designated employee averages, which documents show the production of named employees, General Counsel's Exhibits 20 and 21. Regarding General Counsel's Exhibits 20 and 21, Smith testified that an employee making \$5.60 are individuals who are no longer in a trial period. General Counsel also introduced the personnel files of Willie Mae Starks (G.C. Exh. 22), Judy Stovall (G.C. Exh. 23), and Rebecca Knapp (G.C. Exh. 24). Additional employee averages documents were introduced by counsel for General Counsel, General Counsel's Exhibits 25, 26, and 27. Smith testified that there should be a reason for a probationary employee to stay at the \$4.15 rate in excess of 35 weeks, and that he could not remember any one doing that.

With respect to General Counsel's Exhibit 19, Felsenthal testified that repairs which are caught in the tops and bottoms department would not appear in this document since these repairs are those which are logged in by the finishing department and this work has already worked its way through the tops and bottoms department.

On April 16, according to an employee discipline report, General Counsel's Exhibit 5(b), Eskridge gave Wallace a verbal warning for talking and failure to check bags during spare time. Wallace did not sign the employee discipline re-

port and Eskridge testified that although Wallace did not see the employee discipline report she, Eskridge, did talk to Wallace about this matter. Wallace testified that she did not see this employee discipline report, General Counsel's Exhibit 5(b) before counsel for General Counsel showed it to her. Eskridge never gave her this warning.

Samantha Moody testified that sometime after the union campaign began Eskridge told her that the Union tried to get in once before and failed and the Union was no good and could not help Moody in any way; that Eskridge said that Wallace did not know what she was doing and that Wallace was crazy; and that Eskridge said that one day she was going to make Wallace crawl before it was over with. Eskridge denied ever telling Samantha Moody that Wallace was crazy or telling Moody that she, Eskridge, would make Wallace crawl.

On April 9, Cummings filed a claim with the Arkansas Employment Security Division for unemployment insurance benefits, Respondent's Exhibit 3. Paragraph 12 of the claim form requests the claimant to "*Explain in detail why you are no longer working for this employer (emphasis in original).*" Cummings wrote the following:

I have a certain amount to do in one day or more. And I could not do it every day. So they let me go. I was doing the job to the best of my ability.

Paragraph 7 of the claim form asks "Had you ever been able to do the job correctly? Yes or No (Circle one). If yes please explain." Cummings circled "yes" and gave the following answer: "I did them right but I did not do enough of them in one day." And finally paragraph 11 of the form asks "Do you feel you were performing the job to the best of your ability? Yes or No (Circle one) If no, why did you not perform your job properly? Cummings circled "Yes." Nowhere in the claim form is there any mention of the fact that Cummings could not make production because allegedly she was forced to work with a defective piece of equipment.

On May 30 a hearing officer of the Board issued her report on objections in Case 26-RC-7346, Respondent's Exhibit 1, which involved Earle's objections to conduct which allegedly affected the results of the March 8 election which the Union won. In her report, in which she recommended that the election conducted on March 8 be set aside, the hearing officer found that Wallace, who testified for the petitioner or Union at the objections hearing on April 29 and 30 and May 1, gave incredible testimony at that hearing. More specifically, the hearing officer concluded as follows at pages 33 and 34 of her report:

I do not credit Wallace's testimony. Throughout her testimony, she was evasive and argumentative. Admittedly, she was unresponsive to questions because of what she perceived to be counsel's purpose in asking the question. Consistently, I find her answers to be responsive to what she perceived most advantageous to Petitioner's case rather than genuinely factual. Perhaps because she was the only employee witness presented by Petitioner, Wallace accepted responsibility for presenting facts in the best light as possible. Nevertheless, I did not find her to be forthright or spontaneous in her testimony, and I do not credit her testimony. [Footnote omitted.]

The parties stipulated that the Board adopted the hearing officer's report and set aside the first election.

On July 16, according to an employee discipline report, General Counsel's Exhibit 5(a), Eskridge gave Wallace a verbal warning for removing work from another employee's horse without permission from the supervisor. Wallace did not sign the employee discipline report and Eskridge testified that although Wallace did not see the employee discipline report she, Eskridge, did talk to Wallace about the matter. Wallace testified that she did not see the employee discipline report, General Counsel's Exhibit 5(a), except for when counsel for General Counsel showed it to her. Eskridge never gave her this warning. Wallace testified that Eskridge did not counsel her regarding this matter.

According to Eskridge's testimony, on July 26 Respondent's employee Virgil Wright received a written warning, General Counsel's Exhibit 17(dd), because she left her sewing machine without telling Eskridge and went to the office and requested a mechanic; that Felsenthal, Gary Smith, and Young all came up to her desk and asked her what was going on; that she told Wright that she was not supposed to leave her work station and Wright became upset; that she brought Wright to Smith who explained the proper procedure; and that Wright was a union supporter. The employee discipline report signed by Eskridge reads: "Virgil left work station, went to office without telling supervisor and refused to move to a machine when asked to do so."

On August 30 Wallace signed her annual review form, General Counsel's Exhibit 4(e). Her overall score placed her between the good and excellent ratings. Earlier annual review forms, General Counsel's Exhibits 4(a), (b), (c), and (d), generally contained ratings of either good or excellent. At the trial herein, one of Respondent's counsel indicated a willingness to stipulate that Wallace was overall a good employee.

On October 1 the Reverend Jesse Jackson visited Respondent's facility in Earle. Most of the visit was recorded on videotape by a television station, Channel 4, and the tape was introduced herein. (G.C. Exh. 10.) As here pertinent, the tape shows Jackson arriving at the facility. He walks from the highway down the driveway to the gate in front of Respondent's facility where a large group of people, including Respondent's employees, is congregated. He shakes hands with Earley Mae Wallace and then they hug. Wallace and a number of other individuals are wearing red T-shirts with white "Union yes" with a check mark on them. Jackson says a short prayer. Jackson then proceeds to walk into the plant parking lot with a large flatbed truck being driven into the parking lot just behind him. Jackson greets a number of people, shaking their hands and waving to them and then he gets up on the back of the flatbed truck, which has a microphone which is powered by a gasoline engine generator, which is also located on the back of the flatbed truck. A number of people are up on the flatbed truck with Jackson, including Wallace and a number of other people wearing the red union T-shirt. Jackson then begins to give a speech. As indicated by the videotape, after Jackson had been speaking for approximately 3-1/2 minutes, the chief of the Earle Police Department indicates to those on the flatbed truck that Jackson has 30 seconds and then the generator has to be turned off or else the chief will have it turned off. Shortly thereafter the police chief is asked by someone in the crowd if there is a problem and he, the chief, responds that the person will

have to speak to the manager. The police chief goes on to indicate that this is private property and they want them off and "we're here to keep the peace so we have to take them off"; and that "manager Gary Smith asked us to take them off the property." Shortly after that the portable generator is turned off and Jackson continues to speak without a microphone. The Union's director of organizing, Dwayne Stillwell, is then arrested for criminal trespass, handcuffed, and placed in a police vehicle. The man who drove the truck on to Respondent's property, Michael Holdway, is also arrested, handcuffed, and placed in the police vehicle. As he is being placed in the police vehicle Holdway indicates that he is an administrative assistant in the Union. The flatbed truck is then driven off Respondent's parking lot with a number of people, including Jackson, still on it. The videotape then shows Jackson speaking with the two individuals who had been arrested and placed in a police vehicle, indicating to them that he would get them out, and he was going to see the owner and the Governor that day. The police car was parked alongside the highway. Jackson then proceeds to walk back from the highway into Respondent's parking lot. While he is standing in the parking lot the video shows Wallace near him at one point. Jackson then begins walking toward an open door into the plant. As he approaches the door a woman in a red T-shirt raises her right hand above her head and makes a fist as she faces in the same direction Jackson is walking. As Jackson passes her she apparently lowers her right arm and then raises it again. At this point the tape shows Wallace is walking alongside Jackson to his left. As they approach the door, Wallace apparently drops back and Jackson goes through the employee entrance doorway into the plant. Another person appears to go through the doorway just behind Jackson and Wallace then goes through the doorway. As Jackson proceeds into the plant along an aisleway he hesitates, stops, and looks back at the employee entrance. At this point Wallace passes him and then walks in front of him down the aisleway. She then passes Gary Smith who is walking in the opposite direction toward Jackson, who is only a few feet away. Smith holds his left hand up and stops Jackson, saying, "[s]orry, you'll have to leave you're trespassing." A number of people had followed Jackson into the plant including cameramen. While Smith and Jackson are talking, the videotape shows Wallace standing a few feet behind Smith. Jackson appears to indicate to Smith that he, Jackson, is looking for Peter Felsenthal or he may be asking Smith if he is Felsenthal. Smith tells Jackson that he can go back out the employee entrance and go around to the front door of the plant. While he is speaking, Smith motions with his left hand pointing to the employee entrance and then makes a semicircular motion to indicate to Jackson how he would go around from the employee entrance to the front door of the plant. At this point Wallace states "front door locked." She then apparently says "come on." The videotape shows her then changing body position so that she turns away from Jackson toward the offices and begins to move in that direction. At this point Smith turns to his left and speaking over his shoulder, as if to respond to someone behind him, says "no ma'am." Wallace stops her movement toward the office. She then turns back around so that she is facing Jackson and again says "front door locked." Smith is again facing Jackson and he points toward the employee entrance saying "if you will go back around" while Jackson,

who was facing away from the microphone, apparently said something about needing to see Felsenthal. Smith then says "Mr. Jackson if you will I am asking you politely." At this point Wallace raises her left arm and points toward the offices and says "right here." Smith then completes his sentence saying "go back around" to Jackson while he, Smith is pointing toward the employee entrance. Smith then says "cameras are to leave now. Okay." Jackson then says something to Smith who responds "no sir you go out and go around the front." Smith again is pointing toward the employee entrance. Jackson who is facing away from the microphone, apparently says something and Smith says "you go out and go around the front." Wallace says, "yes he's here," while she is pointing with her left arm toward the office area. She then says "right over there" and starts to raise her right arm which is pointing in the direction of the offices. Wallace then leaves the area of the Smith and Jackson conversation. Smith says "Mr. Jackson go out and go around the front please." Jackson then says something about seeing Felsenthal. Smith says, "you may do so if you go out and go around the front." Smith again is pointing toward the employee entrance and making a semicircular motion with his left hand to his left. Jackson then says, "will you go with me?" Smith replies "I'll be glad to show you where it is." Jackson then asks "will you go with me?" Smith replies "no sir I'll show you where it is." Again Jackson asks "will you go with me?" Smith answers "I'll take you to the door and I'll show you around the front wall okay." Smith then says, "you have a problem with that?" Jackson replies "yes. I want you to go with me." Smith then says, "no sir. I want you to go out that way." Jackson, who is facing away from the microphone, then says something and is pointing toward the office area. Smith says, "you are trespassing, now if you will please sir go that way and go back around the front." Smith continues to point toward the employee entrance. Jackson then apparently says, "I am you're guest" to which Smith replies "you are not my guest. If you will go back around and come to the front door. Okay." Smith then states "no disrespect. But if you will please go back around." Again Jackson says something which is not picked up by the microphone, Smith then says, "I'm not going to argue with you. Excuse me." Smith turns and walks toward the office foyer with Jackson following behind. Smith opens the door between the foyer and the offices and closes it behind him and Jackson and a number of other people remain in the foyer. Shortly thereafter, the police chief speaks to Jackson and he and the other members in his group go out the front door and wait outside the front door of the plant for a short period of time. While he is waiting outside, Jackson, in response to a questions says, "I want to talk with the owner about workers' legitimate request to organize." Jackson alone then enters the plant through the front or visitors door. Sometime later he emerges. Not all of what occurred in the background is summarized above.

Regarding her October 1 statement on the videotape that the front door was locked, Wallace testified that when she got off the flatbed truck and was going through the gate back onto Respondent's property she was telling co-workers to clock in since it was getting close to buzzer time; that she overheard Fredricka Hill say, "[w]ell, they're tripping in the office, they've done locked the door"; that Hill said she went to clock her card and her card was not in the slot so

she went to go into the office and the door was locked; and that she, Wallace, presumed that Hill was talking about the front door. Wallace also testified that she, Margaret Davis, Mary Childs, Dorothy Berry, Linda Davis, Marilyn Mathis, Brenda Cooke and others were on the back of the flatbed truck when Jackson gave his speech. According to Wallace's testimony, Margaret Davis was a union supporter, Linda Davis was a very active union supporter, and Marilyn Mathis was an extremely active union supporter. On cross-examination, Wallace testified that she did not in any way or form or fashion encourage Jackson to go into the plant or lead him or suggest to him that he come in or point the way. And regarding the above-described videotape of certain events which occurred on October 1, General Counsel's Exhibit 10, Wallace testified, on cross-examination that just before Jackson entered the plant through the employee entrance she was right next to him; that as he went through the employee entrance she was behind him; that there is a working area to the right just inside the employee entrance; that shortly after Jackson entered the plant through the employee entrance Gary Smith approached him and they had a conversation; that while the tape indicates that Smith told Jackson "sorry you'll have to leave, your trespassing," she did not hear him say that on October 1; that during his conversation with Jackson, Smith was pointing in the direction of the employee entrance; that Smith said "[y]ou can go back out and go around the front and come to the front door"; that she then said "[f]ront door locked"; that although the videotape appears to indicate that she then said "[c]ome on," she did not remember saying this; that she said "front door locked" because shortly before that she heard Hill say that "[t]hey're tripping in there, that got the doors locked"; that Hill did not indicate which doors were locked; that Smith might have been talking to her when he said "[n]o, ma'am" immediately after she said "front door locked"; that she then said for a second time "[f]ront door locked"; that she guessed she interfered with Smith while he was carrying out his job duties; that at that time she did not know whether the front door was locked or not; that Smith then told Jackson to go out the employee entrance and to go around to the front door, the visitors' door; that Smith again pointed toward the employee entrance; that Jackson then turned toward her and asked her where Felsenthal's office was and she pointed in the direction of Felsenthal's office saying, "[i]t's up that way"; that she was pointing in a direction which was opposite the direction which Smith was pointing; that when Smith said "[n]o ma'am," he said it in a very firm tone; that Smith was talking when Jackson asked her the location of Felsenthal's office; that when she answered Jackson's questions, Smith was still talking but since Jackson was talking to her, she did not pay Smith any attention; that on October 1 during this conversation she realized that Smith wanted Jackson to leave the plant through the employee entrance; that at one point, apparently in response to a question of Jackson, she said "[y]es, he's here" and then pointed in the direction of Felsenthal's office with her right hand; that she then said "[r]ight over here"; that when she said "[y]es, he's here" she was pointing with her left hand and she did not know if she was pointing also with her right hand; that while Smith and Jackson were engaged in their verbal exchange she walked away and went over to the area of one of the timeclocks; and that she did not clock in until after

she saw Smith and then Jackson walk through the plant and into the foyer just outside the plant office.

With respect to the October 1 visit to Earle by Jackson, Mathis, who has been employed by Respondent since 1985, testified that a number of employees were aware that Jackson would be visiting the plant; that she was not aware, at the time, of the Respondent having a policy about nonemployees visiting the parking area; that she was walking behind Jackson when he entered through the employee entrance into the plant; that she, along with Wallace, Carolyn Williams, Leonard Davis, Brenda Cooke, and possibly Betty Childs, was on the flatbed truck when Jackson spoke; that there were other employees up on the flatbed truck but she could not remember all who were there; that to her knowledge, other than Wallace, no employee was disciplined for anything which occurred during Jackson's visit; that in viewing the videotape, she believes that employee Blanche Bowers pointed toward the employee entrance just before Jackson went through that doorway into the plant; that while Smith and Jackson were talking, an employee of the Respondent whom she thought was Dorothy Dorsey pointed toward the foyer and offices; that while Smith and the Jackson were talking, she left to go to the timeclock area and before Jackson entered into the foyer area she raised her arm in the air which, according to her testimony, was encouraging Jackson to go into the foyer and office area; and that as shown by the videotape, Jackson left the foyer area through the front door of the plant. On cross-examination, Mathis testified that she was an extremely active supporter of the Union and she was one of the more vocal union supporters; that she did not mention in her November 20 affidavit to the Board anything about an employee pointing to the employee entrance or, regarding what occurred in the plant, an employee pointing to the foyer or offices; that before Jackson entered the plant through the employee entrance, Bowers pointed her fist in the direction of the employee entrance but she did not stick her fingers out; that in describing Bowers' gestures she, Mathis, was not relying on her recall of what occurred on October 1 but rather was giving her opinion of what she saw on the videotape which she viewed while she testified herein; that her testimony that employee Dorothy Dorsey pointed toward the office foyer while Smith and Jackson were engaged in their verbal exchange was also based on what she saw on the videotape while testifying herein vis-a-vis what she recalled of what occurred on October 1; that Bowers was a union supporter and was wearing a red "Union yes" T-shirt on October 1; that while Jackson was walking to the foyer she had her closed fist in the air but she was not pointing since her hand was up but not out and there was nothing in what she did which would show that she was trying to get Jackson to come into the office foyer; that she believed that she clocked in before Jackson went into the office foyer; and that, according to the videotape, when Jackson left the office foyer he went through the visitors' entrance or the front door to the plant. Mathis also testified on cross-examination that the area just inside the employee entrance that Jackson went through is the twenty pair department where they make frames for the twenty pair bags; that if you walk through the employee entrance you are walking right through that department but it is a hallway; and that it was a working department when the October 1 incident occurred. On redirect, Mathis testified that Jackson's October 1 visit occurred dur-

ing the lunchbreak; that the whole plant is shut down during the lunchbreak; that it is a nonworking time; and that the hallway in the plant leading from the employee entrance is a nonworking area. On further cross-examination, Mathis testified that two buzzers go off in the plant to signal the end of lunchbreak, one goes off at 11:57 a.m. and the other one goes off at 12 noon; and that the first buzzer went off while Jackson was in the office foyer. On further redirect, Mathis testified that Jackson's October 1 visit occurred during the lunch break; that the whole plant is shut down during the lunchbreak; that it is a nonworking time; and that the hallway in the plant leading from the employee entrance is a nonworking area. Timeclock computer records for October 1 for Wallace and Mathis, General Counsel's Exhibit 29, indicate that both of these employees punched in at 11:57 a.m.

On October 1, according to her testimony, Delores Knighten heard people saying that the door was locked when she was at the timeclock. Since Smith and Jackson had already gone through the doorway separating the timeclock area from the foyer or lobby she realized that the people were not referring to that door. She wondered whether they were referring to the door from the lobby to the offices or the door from the outside of the plant to the lobby and so she looked into the lobby area and determined that the door which was locked was the door leading from the lobby to the offices. Knighten testified that the lobby is not considered a working area.

With respect to the October 1 visit of Jackson, Respondent's employee Joy Chase testified that when Jackson stopped in the plant aisle to talk to Gary Smith, she went to the timeclock, clocked in, stood there for a short period of time and then went to the lunchroom to smoke a cigarette; and that while she was in the area of the timeclock she heard Hill say, "These mother fuckers tripping today. They got the doors and shit lock." On cross-examination, Chase testified that she was a well-known union supporter; that she was on the back of the flatbed truck when Jackson gave his speech; that she saw Wallace in the area of the timeclock but she did not see Wallace clock in; that he did not see Marilyn Mathis clock in; that she heard a lot of chanting, namely "They don't want to meet this man. They got the doors and stuff locked"; that when she heard Hill's statement Jackson was still in the aisle way; and that she heard the first buzzer ring while she was in the lunchroom.

Respondent's employee Margaret Davis testified that on October 1 she was on the flatbed truck when Jackson spoke. According to her testimony, after the truck was pulled off Respondent's premises, she heard a lot of people saying that the office door was locked. Davis specifically testified at this point that this occurred before Jackson went into the plant. On cross-examination, Davis testified that she did not earlier testify that she heard out in the parking lot someone say that the door was locked; that she had already clocked in when she had heard someone say that the door was locked; that she believed that the door referred to was the door from the outside at the front of the building into the lobby for no other reason than she believed that if the door was not locked Jackson would have come through that entrance instead of the employee entrance; that when she heard that the door was locked Jackson had already come through the employee entrance into the plant and was speaking with Smith; and that the person who said the door was locked was not

Wallace because this remark was made before Jackson made it that far down the aisle and it was just before the time that she clocked in.

Regarding Jackson's visit to the plant on October 1, Hill testified that she was present during the incident involving Jackson; that she did not say that day that "These mother fuckers tripping. They don't want to meet the man because they have the doors locked"; that when she was told that 12 people could swear that she made this or a similar statement, she said that they could pay her gas bill for her; that when asked if she was inferring that she might lose her job, she testified "[w]ell, not exactly lose my job. It's just that like if the work gets slow and I'm by myself, I'm trying to make it by myself, you know, that I can get caught up you know financially"; that for the first time in the 11 years that she has worked for Respondent she returned from her lunchbreak on time to find that her timecard was not in the rack; that she told her assistant supervisor, Keith Weaver, who said that he would take care of it; that during the time that she was out in the parking lot before Jackson went into the plant, she did not say anything about any door being locked; and that she does not have a propensity to use profanity in the plant. Weaver corroborated Hill regarding what occurred with respect to her timecard on October 1. Weaver also testified that he has heard Hill used "cuss words" in the plant but that he has never heard her say "mother fucker"; that he has heard Hill say things like "tripping"; that Hill never wore a union T-shirt; that in the past 10 years he has never had to arrange for Hill to have her card punched; that he did not know of anyone else having a problem getting their card punched that day; that he went to the front office and told a secretary, Carolyn, to punch Hill in; that he has never had to do this for another employee coming back from a normal lunchbreak; that normally it would be something that the employee could take care of herself and he normally would not have to be involved; and that considering what occurred, Hill's timecard would be stamped sometime after 12:15 p.m. that day.

Regarding the incidents of October 1, Felsenthal testified that the Company has always had a policy of not permitting non-employees into the plant without express authority; that there is an "Employee Only" sign posted just outside the door which Jackson came through on October 1; that with the exception of what is posted by the door, there is no written policy regarding nonemployees in the plant; that the policy has been in effect since he began working at Earle; and that he thought there had been occasions where specific employees were talked to about the policy and it is just common knowledge that nonemployees are not permitted in the plant without authorization. On cross-examination, Felsenthal testified that he instructed Smith to remove Jackson from the plant because at that point in time he, Felsenthal, was concerned that Jackson was going to go wandering in the plant and visit with employees and he, Felsenthal, was not aware, at that time, that Jackson entered the plant to see him. Felsenthal testified further on cross-examination that Jackson raised a number of topics during their 30- to 45-minute discussion, including health insurance, working conditions, the need for the employees to be organized, an election date, matters of policy and working conditions, and various documentation that was required for absences. On redirect, Felsenthal testified that on October 1 during his meeting with

Jackson, Jackson said with respect to the two union organizers who had been handcuffed and arrested that "It would be in your best interest to have these individuals released, because I don't think you want to make more of a media issue out of this, than it already is." Felsenthal testified that he did not believe that he had any other choice and told the police chief that he did not intend to press charges. On further cross-examination, Felsenthal testified that he made a conscious decision not to discipline Mary Dorsey who was pointing toward the offices on October 1, as evidence by the videotape; that documents were prepared regarding the investigation of Wallace; that documents were prepared regarding the investigation of Mathis; that the only thing in the record pertaining to Mary Dorsey was a memo of Gary Smith which made reference to Dorsey indicating that he talked to Dorsey during his investigation; and that he, Peter Felsenthal, did not recall any other specific documents.

With respect to what occurred on October 1, Respondent's employee Maggie Lucas testified that she had just clocked in and was walking back away from the timeclock when she saw Jackson, Wallace, and Gary Smith; that while Smith and Jackson were talking, Wallace left the group, went up to the door leading into the foyer, motioned for Jackson to come on and said "It's this a - way, the office is this a - way"; and that the motioning involved Wallace utilizing her right hand with an upwardly turned palm coming towards her body. On cross-examination, Lucas testified that she was about 32 feet from the timeclock when she saw Wallace; that she did not know if Mathis was near Wallace; that she did not know who was around Wallace at the time; and that she was able to observe both Jackson and Wallace by turning left and then right. Lucas further testified that when she observed Wallace by the entrance to the foyer she was about 10 to 15 feet from Jackson and Smith.

Regarding October 1, Respondent's employee Francis Jones testified that she was standing by the lunchroom door when Jackson and Gary Smith were conversing; that she saw Wallace walk away from the group in the aisle and proceed to the door leading into the foyer; that Wallace motioned to Jackson with both hands with palms raised motioning toward her body; that at that time Wallace said "This is the office door this a - way" and "Come this a - way"; and that Wallace was standing about 8 to 10 feet from the office door when she made these motions. On cross-examination, Jones testified that Lucas was standing with her during this incident; that she was standing about 10 feet from Jackson and Smith; and that Wallace was standing there alone but there were some people who came up behind her. Jones further testified that while Wallace stood near the door to the foyer, she was motioning and clapping her hands.

Respondent's supervisor, Jimmy Farmer, testified that on October 1 he saw Assistant Supervisor Keith Weaver near the timeclock by the office; and that Weaver told him that he was going to the office to check on Hill's timecard. On cross-examination, Farmer testified that he saw Weaver about 5 or 10 minutes after lunch, which was when Jackson was outside the building.

Regarding Jackson's October 1 visit to Respondent's plant, Bobbie Brown, who became an assistant supervisor at Earle sometime after the October 25 election, testified that she saw Jackson come back onto Respondent's property after the flat-bed truck had been driven off; that when Jackson came back

onto Respondent's property with a group of people it appeared to Brown that Wallace was leading Jackson into the plant; that apparently Jackson did not know where he was going so she just assumed that Wallace was showing him to a destination where he, Jackson, was trying to get in; that as you enter the plant through the involved doorway, you are in a working area, namely, the wire department; and that subsequently she heard some of the employees say that Wallace led Jackson, apparently, into the office area. On cross-examination, Brown testified that if she had given a statement regarding the October 1 incident she would have mentioned what she had heard. When counsel for General Counsel asked her if she ever had been asked questions by management about the October 1 incident, Brown asked if she had to answer the question. Subsequently Brown testified that she did give a statement to Respondent's management about the October 1 visit of Jackson. Her three-page, undated statement is included in General Counsel's Exhibit 8. The statement makes no mention of what she allegedly heard employees say regarding Wallace leading Jackson to the office. Brown testified that Smith asked her to submit a written statement and she may not have submitted it until weeks after Jackson's visit. The second line of Brown's statement indicates that Jackson's visit occurred on September 2. With respect to the events of October 1, Cassandra Cummings Riley, who took the married name of Riley in March 1992, was employed at Burger King at the time of the hearing herein, and was subpoenaed by Respondent to testify herein, testified that the statement she gave to Respondent on October 17, General Counsel's Exhibit 7(d), is true; and that this statement contains the following sentence:

On October 1, 1991, I was standing outside the employee entrance. I heard Jesse Jackson say he wanted to talk to Peter and Earley Wallace said come this way and Earley Wallace showed him the way inside the building.

Further, Riley testified that after Jackson was driven off Respondent's property while on the back of a flatbed truck, he returned to Respondent's property; that Jackson was going toward the visitors' entrance, which is the front entrance to the building, and Wallace grabbed his arm or locked arms with him and proceeded toward the employee entrance; that the physical contact between Wallace and Jackson lasted for a second or two; that she personally observed this physical contact; that she overheard Jackson saying that he wanted to see Peter and Wallace saying, "Come this way"; that Respondent has a rule about visitors coming into the plant, namely, that any visitors are to use the visitors' entrance, which is the front entrance; and that Mary Smith told her about this rule when she was employed at Respondent. On cross-examination, Riley testified that no one in Respondent's management spoke to her before October 17 regarding the events of October 1; that she was not 2 to 3 feet away from Jackson and Wallace when the latter grabbed the former's arm, as she, Riley, testified on direct but rather she was approximately 15 feet away from Jackson and Wallace when the physical contact occurred; that there was a lot of noise when Jackson re-entered the parking lot; and that in her opinion, there were more than a 100 people in the parking lot during the Jackson visit. On redirect, Riley testified

that she may have been mistaken on cross-examination when she testified that the physical contact between Jackson and Wallace occurred after Jackson stopped in the parking lot, turned toward the entrance to the parking lot and motioned for someone to come forward; and that the physical contact between Jackson and Wallace could have occurred before Jackson made his above-described motion. Gary Smith testified that he did not believe that Cassandra Cummings Riley ever told him that she saw Wallace lock arms with Jackson on October 1.

When called by Respondent, Gary Smith testified, with respect to what occurred on October 1, that Respondent's management became aware that there was a truck in its parking lot; that Felsenthal asked him to go out and investigate; that he reported back to Felsenthal who told him to ask the police chief to ask the people to leave; that he went back out to the parking lot and asked the police chief to have them get the truck off the parking lot since they were blocking traffic and trespassing; that at this time one of the individuals with Jackson's party asked him, Smith, if he could just give them a couple more minutes; that he told the individual that he had to leave then since he was trespassing; that he then told the police chief that they had 30 seconds to get the truck off Respondent's parking lot and when the 30 seconds were up he told the police chief that the time was up and that he needed to get them off; that when the truck was driven off the parking lot he went back into the plant and was talking with Felsenthal when he was informed that Jackson had entered the plant; that he went to stop Jackson from coming into the plant; that when he had broke off his discussion with Jackson in the aisle of the plant he did not ask Jackson to follow him; that while Wallace appeared to be telling Jackson that the front door was locked, to his, Smith's, knowledge the front door was not locked; that the front door is never locked at that time of day; that just inside the involved employee entrance, work is done on both sides of the aisle; that while he was attempting to get Jackson to leave, Wallace was encouraging him to come on and this was insubordination; and that afternoon after the incident he felt something had to be done regarding Wallace's action and while he had not ruled out the possibility of discharge, he felt that she had to be disciplined and he thought that she needed to be suspended.

With respect to Jackson's visit and its aftermath, Felsenthal testified, when called by Respondent, that during the afternoon of the incident he and Gary Smith discussed the fact that Smith believed that Wallace had interfered with his efforts to have Jackson cease his trespass and leave the facility and that it was then decided to investigate the whole incident further. On cross-examination, Felsenthal testified that he recalled a Caucasian gentleman with a beard standing behind Gary Smith when Smith was talking to Jackson; that the individual in question does not work for Respondent; that the individual in question was not there at Respondent's invitation; that if Respondent's employee Dorsey was pointing to the office area while in the proximity of this gentleman, he, Felsenthal, did not know if she was frustrating anyone's efforts to have Jackson and other nonemployees leave the plant; that he would not state that the mere act of pointing to the front office door would be a violation of company policy; that he did not know who might have asked Dorsey that question; that he did not know after viewing the video at the

hearing herein, that he reached any determination from looking at what he saw on the video; that if someone was merely pointing he certainly did not think that it would have been an action that would have been frustrating Smith's efforts to have Jackson leave the plant; that Smith was trying to get everybody that was a nonemployee out of the plant; that at the outset he directed Smith to go out and try to have Jackson and all nonemployees removed from Respondent's parking lot; that when he was notified that Jackson was in the plant, he told Smith to go into the plant, tell them that they were trespassing and ask them to leave Respondent's property; that he told the police chief that Jackson could remain in the foyer as long as he wanted or Jackson could see him, Felsenthal, in the absence of any media; and that he met with Jackson for 30 to 45 minutes.

On October 2 Earle filed a charge in Case 26-CB-2879 against the Union alleging a violation of Section 8(b)(1)(A) with respect to what occurred on October 1.

By a two-page memo dated October 3, Gary Smith summarized for Felsenthal what occurred on October 1 with respect to the visit of Rev. Jackson. The second page of the memo includes the following paragraph: "During this entire period Earley Wallace kept encouraging Rev. Jackson through activities and comments, to walk further through the plant to the front office against my instructions."

On October 5 Felsenthal received a videotape from Channel 4 of the October 1 incident. General Counsel's Exhibit 10.

On October 6, a Sunday, Felsenthal reviewed the videotape with one of the attorneys representing Respondent herein, Jeff Weintraub. Felsenthal testified that most of the discussion regarding the tape revolved around the filing by Earle of a charge with the Board against the Union with respect to what occurred on October 1. That evening Felsenthal telephoned Gary Smith and again discussed the October 1 incident. Felsenthal testified that he did not advise Smith during this telephone conversation that he, Felsenthal, had a videotape. During the telephone conversation, Smith indicated that Wallace had been quite insubordinate to him and that serious disciplinary action was warranted, possibly termination. It was decided that Felsenthal and Smith would meet with Wallace on Monday, October 7. Felsenthal testified that at this point in time he had determined that termination was warranted under the circumstances but he had not reached a final decision.

When called by Respondent, Gary Smith testified, regarding his telephone conversation with Felsenthal on October 6, that Felsenthal asked him what he had observed during the incident and how he felt about what had happened; that Felsenthal also asked him what did he think needed to be done; and that he told Felsenthal that they needed to speak to Wallace and "hand out some kind of discipline. At least a suspension."

On October 7 Felsenthal interviewed Wallace. Gary Smith and Eskridge were also present. The interview was conducted in Smith's office. Unknown to Wallace, the interview was recorded. A tape recording of the interview was received herein as General Counsel's Exhibit 11 and a transcript of the tape recording was received herein as Joint Exhibit 1. Felsenthal testified that he did not personally interview any other employee regarding the involved incident with conducted other interviews. At first Wallace refused to answer

Felsenthal's questions, indicating that if she was going to be accused of something, she had a right to have an attorney present. Felsenthal indicated that he would allow her to have a fellow worker present but Wallace indicated that she was not going to answer any of the questions. Later in the interview, Wallace stated that she was not refusing but that she didn't understand exactly what Felsenthal was up to and that she would not answer the questions. When Felsenthal explained that he believed that Wallace interfered with Smith's management authority, that she was insubordinate, that she assisted a nonemployee against company policy to enter the plant through an employee entrance, and that a number of employees were scared and had their work interfered with, Wallace said "[d]idn't you see the film and the video?" Felsenthal replied, "I saw what was on TV and that was it." The transcript of the interview is attached hereto as Appendix C. During the interview Wallace stated that she did not indicate to anybody that the front door was locked; that she did not at any time motion or encourage Jackson; and that she did not know it was against company policy for nonemployees to be out in the plant since she sees nonemployees come into the plant without authorization through the side door, which is the employee entrance. During the interview Wallace stated that, with respect to the conversation between Smith and Jackson, there was so much noise she was not paying attention to Smith and she did not know what Smith was saying. At another point when she was asked if she heard Smith tell Jackson that he was trespassing, Wallace said that she was not going to answer "those questions. I'm going to get me a lawyer."

Wallace testified that at no time before the tape recorder was used was she told or warned that refusing to cooperate in this investigation would result in her discharge. On cross-examination, Wallace testified that initially she refused to answer any questions because she believed that she was being set up; that she did not understand the purpose of Felsenthal's questions on October 7 although she did understand the questions themselves; that when she told Felsenthal on October 7 that she did not have anything to say to Smith or Jackson while they were in the plant, what she actually meant was that she did not remember; that Felsenthal told her during the meeting that if she refused to cooperate, it would be a violation of company policy; that she stated during the meeting that she did not indicate to anybody that the front door was locked; that she stated during this meeting that she did not at any time motion or encourage Jackson because she did not remember whether she did it or not; that while she did not believe at the time that she was interfering with Smith's efforts, after viewing the videotape she realized that her conduct was a lot worse than she thought at the time; that at the time of the meeting with Felsenthal she did not know it was against company policy for nonemployees to be coming into the plant area and after she was fired she read the handbook and saw this policy statement; that she did not recall reading this in the handbook before she was fired; and that although she told Felsenthal on October 7 that she did not know of anything she did or said which interfered with Smith's efforts, on reflection she realizes that while she was not trying to interfere, she did. On redirect, Wallace testified that Felsenthal did not tell her at the meeting that he was tape recording what was said; that he did not warn her at any time that what she said would be used in a discharge

against her; that he did not tell her that it was a disciplinary interview; that Felsenthal said that he saw what was on T.V. and that was it and he, Felsenthal, did not tell her that he had reviewed the Channel 4 videotape in depth before meeting with her; that Felsenthal did not allow her to view it; that she has a history of being discharged from this Company for union activity; and that this was a concern of hers when she went into this interview.

On October 7, according to the testimony of Felsenthal, when he was called by Respondent, he and Gary Smith looked at the videotape, General Counsel's Exhibit 10, or if Smith did not see it at that time he, Felsenthal, discussed the content of the videotape with Smith. Felsenthal testified that he and Smith, before interviewing Wallace, did not discuss anything about Wallace's union position or that union status would be a factor in any discipline or discharge; and that he did not make any such statement to anyone else. According to his testimony, Felsenthal conducted the interview because Gary Smith was involved in the incident under investigation and he, Felsenthal, wanted to be as objective as possible in the handling of this matter. Felsenthal testified that he and Smith decided to record the interview of Wallace, without her knowledge, so that there would be a record from which to prepare a memo, because it was believed that a charge would be filed with the Board if some disciplinary action was taken against Wallace. Also, Wallace assertedly had shown a propensity to be untruthful in testimony and Board proceedings, as evidence by Respondent's Exhibit 1, and he wanted to protect the Company. Felsenthal testified that often Smith records employee interviews for purposes of having a record so that he can create a file memo; and that its a fairly regular practice by Smith. Prior to his interview with Wallace, Felsenthal reviewed her personnel file and in doing so, read some documentation with respect to alleged strike misconduct by Wallace in 1982, which conduct she denied. Felsenthal began working at Respondent in 1981 as vice president. He testified that in 1980 or 1981 before he began working for Respondent, he attended a Board hearing involving Wallace while he was a staff attorney in the Social Security Administration working in the same building in Memphis, Tennessee, where the hearing was held. Felsenthal also worked for a law firm in Memphis, in which the firm represented labor unions and individual employees. He testified that he had decided, before his interview with Wallace, that depending on her responses, she might not be terminated after the investigatory interview; that one thing he looks for in his investigatory interviews is the degree of cooperativeness and truthfulness of the individual being interviewed, the degree of repentance, their understanding of the wrongdoing, and their acknowledgement that what they did was wrong. According to Felsenthal's testimony, there were times when he felt during the interview of Wallace that she was lying. In terms of repentance, Felsenthal testified that he was looking for repentance with respect to her own conduct of bringing Jackson into the plant, leading and encouraging him into the facility and significantly interfering with the management authority of Smith, by acting in an insubordinate manner toward Smith and engaging in conduct that had the effect of scaring at least one employee, and interfering with the work of other employees, particularly in the office. After the interview of Wallace, Felsenthal and Smith concluded that they would discuss the matter the following day and reach a final

decision. On cross-examination, Felsenthal testified that the statements in Wallace's personnel file regarding her alleged 1982 strike misconduct were not sworn statements; and that he honestly did not know if a strike misconduct charge was ever filed.

It is noted that with respect to the documents Felsenthal testified he reviewed in Wallace's personnel file before deciding to record her interview, that Respondent's Exhibit 22 as contained in the original exhibits appears to be a duplicate of Respondent's Exhibit 21. However, Respondent's Exhibit 22 is described with sufficient particularity in the transcript in that it is indicated therein that Wallace denied the specific strike misconduct.

Also on cross-examination, Felsenthal gave the following testimony with respect to Wallace's October 7 interview:

Q. BY MS. SPEER: (Resuming) At one point in this conversation, you asked her—you told her that you were investigating it, and anyway she tells you. "Well, you seen it, didn't you see the film and the video? Didn't you see them walk in together?" and you respond, "I saw that, I saw what was on T.V. and that was it." That's the total truth to you, isn't it?

I think I testified before that that's the case. Ms. Speer, this was an event that was, that was in public, that was . . . [filmed] extensively. It was not my intent, or it was my intent not to present the video that I had to Ms. Wallace. I think I've testified to that.

Q. But you didn't testify that you lied to Ms. Wallace during this investigation, did you?

A. That I lied?

Q. You did lie to Ms. Wallace didn't you? That's a "yes" or "no" answer, Mr. Felsenthal. You lied to her, didn't you?

A. I did not indicate to Ms. Wallace that I had this particular video. I don't know if Ms. Wallace had it or not.

There were, there were—The news media was all over this event. It was—I don't—There were portions of the tape that I had that were on the News, there were numerous other News stations. This was not some kind of "Candid Camera" episode here. There was no intent on my behalf to trick Ms. Wallace, or to entrap Ms. Wallace.

I merely, I asked Ms. Wallace questions relating to the specific conduct that we believed that she had engaged in. I solicited answers, or solicited responses from her. But this was not an attempt to trick Ms. Wallace, or to deceive Ms. Wallace, to trap her.

JUDGE WEST: According to what Counsel for General Counsel just read into the record, apparently the transcript states that you responded: "I saw what was on T.V. and that was it."

Does that accurately state what is in the transcript?

THE WITNESS: I think that does, yes.

JUDGE WEST: Is that the truth?

THE WITNESS: I had seen more than what was on T.V.

JUDGE WEST: So, then, that was not the truth.

THE WITNESS: The fact that I had seen the video.

JUDGE WEST: And that was it.

THE WITNESS: And that was it. That was my response, at the time.

JUDGE WEST: So, that was not the truth.

THE WITNESS: In reading that, it certainly can be construed as not the truth.

BY MS. SPEER: You also state, "I don't know what went on," but you knew exactly what had went on. You had viewed the video numerous times. You had viewed it on your own, you had viewed it in the presence of counsel, you had stopped it, you had studied that video. You knew pretty much exactly what went on, didn't you?

I didn't know what—on—I knew what went on, but not by my physical presence at the time it occurred, but in my—yes, as you say, with respect to the video, and in respect to the other evidence that I had, yes, I knew, I had known what went on.

Felsenthal also testified on cross-examination that if Wallace had shown some remorse or repentance during her October 7 interview or if she had admitted the wrongdoing, she might not have been discharged.

In a file memo dated October 7, Respondent's Exhibit 20, Peter Felsenthal briefly summarized what occurred between October 1 and the night of October 6.

When called by Respondent, Gary Smith testified, with respect to October 7, that he saw the involved video and after viewing it he talked with individuals that he saw in the video who were in the background during his discussion with Jackson; that he talked with employees Joe Blockman, Michelle Smith, and Debbie Evett; that he spoke with employee Marilyn Mathis either that day or the next day; that he reported back to Felsenthal and it was decided that they needed to speak Wallace; that Felsenthal compiled some questions and they met with Wallace that afternoon in the presence of Eskridge; that he spoke with Maggie Lucas and Frances Jones on October 7 prior to meeting with Wallace; that he taped the Wallace interview because previously he attended a Board hearing at which Wallace testified and he had observed that she was not truthful; that he has taped employee interviews in those situations where he has questioned whether the employee will tell the truth or not; that he does not have a practice of recording employee investigatory meetings based on union sympathies of the particular employee; that he has never taped a meeting because the employee was a prounion employee; that he has recorded an interview with a supervisor; that he may have spoken to Evett and other employees a second time later in the month; that Wallace would not answer questions during her meeting with Felsenthal, himself, and Eskridge; that after the Wallace interview he and Felsenthal discussed the fact that Wallace was uncooperative in not answering the questions and they discussed the possibility of terminating Wallace; that up to that point, while they had discussed the fact that Smith thought that a suspension was appropriate, a firm conclusion had not been reached; that after the Wallace interview he felt that if she was not going to cooperate, then he saw no need in keeping her as an employee of Respondent; that he and Felsenthal discussed the probability that a Board charge would be filed but they decided that this would not be dispositive; that they did not reach a final decision regarding Wallace that day; that he did not feel at that point that Wal-

lace had shown any remorse; that he and Felsenthal discussed the fact that nothing of this magnitude with an employee had occurred at this Company, namely, bringing in such an individual and having such an impact on the work force; that the Respondent has never permitted an employee to bring an attorney into an investigatory interview since he had been there; that Respondent does not have a policy of presenting all of the evidence that the Company may have against the particular employee to the employee during the investigatory interview with the employee; that the Company approaches investigatory interviews on a case-by-case basis, sometimes presenting the evidence to the employee and sometimes it does not present the evidence to the employee; and that Wallace was suspended pending the investigation.

With respect to the October 7 interview of Wallace by Felsenthal, which interview Eskridge attended, Eskridge testified that at the time she did not know that the interview was being recorded; that she was aware of the fact that Smith had recorded other meetings in the past; that she thought Smith tended to record meetings when the employee was capable of being untruthful; and that to her knowledge, Respondent does not record investigatory meetings only of union supporters. Eskridge testified further that Respondent has always had a rule allowing employees only in the work area in the factory; that nonemployees are allowed to go to the foyer; that she once saw nonemployees in the plant, namely the Moodys; and that Barbara Moody took the Moodys back to the front of the plant. On cross-examination, Eskridge testified that before Jackson's visit there had not been a paper posting of any rule with respect to nonemployees in the plant other than the "Employees Only No Solicitation" sign outside the employee entrance door.

On October 8, Wallace was terminated. Felsenthal testified that he consulted with Personnel Manager Gary Smith but the ultimate decision was his, Felsenthal's. Wallace, then named Earley Morton, was discharged by Respondent and reinstated pursuant to a Board settlement dated October 23, 1978. (G.C. Exh. 9(b).) Also, Wallace, then named Morton, was discharged by Respondent and reinstated pursuant to a Board decision and order dated March 22, 1982. (G.C. Exh. 9(a).) Felsenthal testified that he was aware that Wallace was reinstated on two separate prior occasions because she had been discharged for union activity.

Gary Smith testified that on October 8 he telephoned Wallace and informed her that as a result of the investigation Respondent was terminating her employment; that before calling Wallace he met with Felsenthal that morning and they jointly decided to terminate Wallace; that they reasoned that Wallace had not been cooperative in the investigation and she had shown no remorse; that to show remorse, she would have had to apologize for doing it; and that he prepared General Counsel's Exhibit 7(a) which is a file memo from Felsenthal dated October 8 relating to the termination of Wallace.

Wallace testified that when she was discharged on October 8, she was told that she was being discharged because she was guilty of leading an unauthorized person into the building. Wallace had worked for Respondent for 16 years. She testified that she was a key organizer for the Union. Wallace also testified that during the involved campaign she wore union T-shirts every day and she wore union buttons; that her past evaluations had been good to excellent and that she

had not been disciplined, to her knowledge, in the year before her most recent termination; and that Peter Felsenthal came with his parents to the Board hearing over one of the firings.

When called by General Counsel, Felsenthal gave the following testimony regarding the discharge:

Q. What were the reasons for her—What was the justification for her discharge?

A. There were a number of reasons. One of the reasons was Ms. Wallace's action of assisting and encouraging a non-employee third party, that being Reverend Jackson, into our facility, into our plant. Encouraging him to remain there, and also proceed through our facility into the front office area, through the "Employee Only" entrance.

Another reason was her actions and conduct had the effect of coercing and interfering with employees, particularly employees in the office area, and also one employee, in particular, that I'm aware of, as far as scaring that employee, when Ms. Wallace and Reverend Jackson came into the plant through the "Employee Only" entrance.

Another reason would be her insubordinate conduct toward Personnel Manager, Gary Smith. Her actions undermined his efforts to have Reverend Jackson removed from the plant, and those actions were persistent, in spite of Mr. Smith's intents to have Reverend Jackson, as a third party trespasser, removed from the facility.

The fourth and final reason, and this is probably the most significant reason—well, it is the most significant reason of the four—and it is her conduct in an investigatory interview, her conduct of being uncooperative, her conduct of refusing to answer questions although she eventually did answer some questions, and above all, her conduct of being untruthful in that investigatory interview.

Q. So, those were all the reasons?

A. Those are the reasons, the primary reason, again, being her active—of her dishonesty toward the company and myself, Gary Smith, and Louise Eskridge, who was present in there—lying to us, being untruthful with us, and being uncooperative in that session.

Q. So, are you saying that but for her conduct during the investigation you would not have discharged her?

A. I felt, going into that investigation, into that meeting, I had not yet determined what action would be taken. I went into that meeting with an open mind. I knew and felt that the circumstances prior to that investigatory interview, were serious, and justified serious disciplinary action, possibly termination.

I am convinced though that absent that last reason, the reason being her conduct in the investigatory interview, that the discharge would not have occurred.

I don't think I would've felt comfortable terminating Ms. Wallace, absent that last reason, particularly if Ms. Wallace had not lied to us, had been cooperative, had repented, had indicated her wrongdoing, and had agreed not to engage in that kind of conduct again. That didn't happen.

Q. So, her significant interference with the Personnel Manager's authority, and her actions in an insubordinate manner towards said authority, would have just led to what kind of discipline?

A. Assuming that she cooperated in the interview, perhaps—

Q. (Interposing) No, not assuming that at all. Just assuming that you know that on October 1st, you perceived her as being insubordinate, what would that have resulted in?

A. I think, as I said, I feel like those circumstances could have warranted termination. The act of insubordination, the act of undermining the authority of management personnel was very serious. I said earlier that I didn't know if I would feel comfortable terminating her under those circumstances, if she had cooperated in the investigatory interview.

I tried to look at, or consider what I felt our past practices were, and our past practices, I think, reflect that if an employee understands the wrongdoing, is honest with us, and acknowledges that what they engaged in was wrong, we have, we have been somewhat forgiving under those circumstances.

So, absent, absent different conduct in the investigatory interview, with different conduct in that investigatory interview, the circumstances, I believe, may have been different.

I didn't have an opportunity to really seriously evaluate that prior to the investigatory interview, because it hadn't taken place.

A file memo dated October 8, General Counsel's Exhibit 7(a), states that Wallace was terminated for the following reasons:

1. Ms. Wallace significantly interfered with our Personnel Manager's management authority and acted in a very insubordinate manner toward such authority.

2. Ms. Wallace not only assisted but encouraged non-employees in the violation of a company policy, namely, entering and remaining in the plant without authority.

3. Ms. Wallace assisted and encouraged conduct that had the effect of scaring other employees and conduct that interfered with the work of employees (i.e., office employees).

Further on October 7:

4. Ms. Wallace failed to cooperate with a company investigation regarding her conduct and actions.

Felsenthal testified at the trial hearing that the failure to cooperate encompasses Wallace's conduct of being untruthful.

Peter Felsenthal's father, Donald Felsenthal, was president of the Respondent at the time of the hearing herein, was president of the Respondent during Wallace's earlier discharges and has been employed by Earle Industries since 1962. All references to Felsenthal herein will be to Peter unless indicated otherwise.

When asked whether Respondent had shown Wallace plenty of union animus Felsenthal responded, "I can't deny the past history of the company." Felsenthal went on to testify that he was not an employee of Earle Industries at the time of the previous discharges; that his father played absolutely

no role in this decision to discharge Wallace; that his father does not get involved in employee relations matters and he has not for years; that the past history of Wallace and her current history of supporting this Union did not factor into his, Peter Felsenthal's, decision-making process; that he knew Wallace had been fired for her union activities when his father was in charge of the Company; that there were a lot of policies with respect to this Company that he, Peter Felsenthal, did not agree with when he came to work with this Company; and that his management or employee relations philosophies are different from those which existed at the Company before he came to work at Earle.

With respect to the discharge of Wallace on October 8, Gary Smith, testified that no one except Wallace has ever been fired for failing to cooperate in a company investigation since he came to Earle on August 29, 1989; that Respondent's employee Knapp once threw a bolt on the floor in the plant, refused to pick it up, her supervisor picked the bolt up and, although her supervisor spoke to her about it, Knapp did not receive a written warning; that employee Gary Hicks refused to answer Supervisor Virgil Gaines' inquiries about a foil-wrapped package found at Hicks' work station and Hicks refused initially to go to the office; that Smith took the foil package to the police station to have it analyzed; that subsequently Hicks did come to Smith's office but again he initially refused to cooperate until later in the meeting he indicated that it was only salt; that Hicks was suspended; that he gave an affidavit to the Board on November 14 and in it he indicated that the Hicks was counseled over this incident but he was not warned; that on January 25, 1992, he, Smith, supplemented his affidavit to indicate that Hicks had been suspended; that Hicks received a 3-day suspension and that it occurred less than a week before Smith gave his affidavit to the Board; that on one occasion employee Diane Moody had a confrontation with her supervisor because the supervisor entered the restroom to check up on Moody and Moody became upset, refusing to go to Smith's office; that Moody was suspended; that employee Jewell Ledbetter was not terminated or suspended but rather counseled when she refused to cooperate with her supervisor with respect to a job her supervisor requested her to do; that he had drafted a memo to file dated November 19, General Counsel's Exhibit 17(z), regarding Diane Moody and in it he indicated as follows:

I was contacted by Mr. Lansford, one of the security guards at the main gate, and he indicated that Mr. Weatherspoon, who is dating Diane Moody, had sneaked in. This is not the only occasion that this has transpired. He informed me that he also came through the west entrance the other day at 3:30 p.m. when the gate was open for other people and ran around to the front without heeding Mr. Lansford's warnings to stop. He finally did talk with this gentleman and Mr. Lansford told him that if he continued to do so that he would possibly have him arrested for trespassing. I talked with Diane and instructed her to tell him not to come on the premises and that he could see her outside of the gates but if this did occur again actions would be taken.

Smith went on to testify that there had been one other warning issued for an employee entering the plant and visiting another person prior to the incident covered in his November 19 memo; that the preceding one involved Diane Moody and visitors coming into the plant; that he would not remember the specific date of the incident and he did not think that he made a memo regarding it; that at that time he did tell Diane Moody "Be sure and tell your boyfriend [Weatherspoon] not to go into the plant"; that the previous incident occurred about 1 month before the incident which is covered in the November 19 memorandum; that in the previous incident Respondent's receptionist, Sharon Lee, told Smith that Weatherspoon had gone into the plant and he, Smith, went out and asked Weatherspoon to leave; that during the previous incident he told Diane Moody that if Weatherspoon did not stay out of the plant then she "could suffer the consequences"; that Diane Moody was not terminated like Wallace because she, Diane Moody, did not request this individual to come into the plant; that employee Willie Gibbs was, according to General Counsel's Exhibit 17(ff), suspended for 10 working days without pay for bringing a marijuana cigarette into the plant in August 1987; and that Gibbs received a verbal warning in March 1990, General Counsel's Exhibit 17(ii), when, after being asked by a supervisor to work a little faster, he, Gibbs, got angry and used some vulgar language.

Regarding the use of the employee entrance by non-employees, Wallace testified that her daughter has used the entrance; that one of Respondent's former supervisors, Glenda McCain, who has not worked at the plant since 1987, used the employee entrance after she was no longer employed by Respondent; that Respondent's employee Barbara Brown's husband used the employee entrance to come into the plant and then had someone get his wife when she had problems with her automobile; that Plant Manager Jim Young's wife, Sylvetta Young, came into the plant, took a slap at Beverly Burford, slapped her husband James Young and spit on him when he tried to stop her, and when he said this is not the place for this, she, Sylvetta Young, said "[t]his is where it started"; that Personnel Director Gary Smith got involved in the Sylvetta Young incident while it was taking place; that she, Wallace, left the area of the Sylvetta Young incident because she did not know if Sylvetta Young had a weapon and she, Wallace, was frightened; and that in July the Moody family was in the area from Minneapolis, Minnesota, for a funeral and they came through the front entrance into the plant, with some of them going into the shipping area of the plant. On cross-examination, Wallace testified that her daughter Angela Bell Hawkins came in the employee entrance in 1991 on a Saturday to get her, Hawkins', car keys; that Eskridge came and got Wallace when her daughter came to the plant; that when she brought the keys to her daughter, her daughter was standing in the plant about 5 feet from the employee entrance; that it was not raining that day; that she did not see Eskridge with her daughter at that time; that she did not see McCain come in the employee entrance but rather McCain usually went to the office, visited, and then came into the plant; that McCain visited the plant three or four times a year ever since she quit in 1987; that she has seen McCain in the plant on a Saturday and normally the front door is locked on a Saturday and the only way to gain entrance into the plant is through the em-

ployee entrance; that Supervisor Barbara Moody saw Barbara Brown's husband inside the plant, after he had come in the employee entrance, and she, Barbara Moody, went to get Barbara Brown; that after attending the funeral of Larry Williams in Earle in July, the Moody family came into the plant by the front entrance during the lunch hour; and that she saw Alma Moody and her daughter talking to Jimmy Ray Farmer in shipping.

Regarding individuals other than employees using the employee entrance to come into the plant, Mathis testified that she worked late a lot of evenings and her son Kevin would come into the employee entrance door and get her attention to let her know that he was out there; that Melvin Weatherspoon has used both the employee entrance door and the shipping department door to enter into the plant to see his girlfriend who works there, Diane Moody; that Plant Manager James Young's wife Sylvetta came into the plant on a Saturday, spoke to Supervisor David Forehand, and then went to the desk of Beverly Burford where she, Sylvetta, became engaged in an altercation involving Burford and her, Sylvetta's, husband; that employee Betty Childs' daughter, Leslie, has come into the plant; that Alma Moody and her daughter and two or three other people in the group came into the plant one day and they were standing near the timeclock; that former Supervisor Glenda McCain visits the plant, mostly on Saturdays; that Assistant Supervisor Bobbie Brown's husband came to the employee entrance door and stood by the door until someone summoned Bobbie when she had problems with her vehicle; that, to her knowledge, prior to Jackson's visit to the plant it was never an issue for people to come inside the plant; that none of the incidents which she related involving individuals who were non-employees entering the plant involved situations where they first went to the front office; and that after Jackson's visit, Respondent "beefed up" security, installing cameras, locking the gate to the parking lot, and requiring visitors to wait at the gate whereas in the past they were allowed to come to the foyer outside the office. On cross-examination, Mathis testified that she did not know if Sylvetta Young was escorted out of the plant; that she was not aware whether anyone from the Respondent asked the Moodys to leave at some point; that she walked away from the Moodys while they were still in the timeclock area and went back to her own work area; that she had no knowledge whether McCain was authorized to be in the plant at the times she, Mathis, saw her; that she was not aware of any incident like that which occurred on October 1 where a number of people, some of whom were not employees, came into the plant and were asked to leave and refused to leave; and that in the summer of 1990 she asked her supervisor to ask Young if it would be alright for her son to come into the plant cafeteria and she was told by her supervisor that Young said it was against the plant policy to let people come inside the area but her son could wait outside in the parking lot in her car. Mathis also testified on cross-examination that the area just inside employee entrance that Jackson went through is the twenty pair department where they make frames for the twenty pair bags; that if you walk in the employee entrance you're walking right through that department but it is a hallway; and that it was a working department when the October 1 incident occurred. On redirect, Mathis testified that nonemployee Melvin Weatherspoon would frequently come into the plant to

visit his girlfriend Diane Moody at her work station; and that it was "nothing big ever" to see someone that's not employed in the plant. On further cross-examination, Mathis testified she saw Weatherspoon walking through the shipping department and into the plant cafeteria one time; that another time he came through the employee entrance door to the finishing department and up to the front table; that another time he came through the employee entrance and went up to the supervisor's table in that area; and that Assistant Supervisor Dorothy Smith was in the department at the time but Mathis could not say whether Smith saw Weatherspoon. With respect to her asking her Supervisor Marion Thompson whether her son could come into the plant cafeteria, Mathis testified that it was normal for people to come in and out of the plant but she wanted her son to come into the cafeteria and sit and wait and she was told he could not do that. Mathis also testified that in early March 1992 a sister of Respondent's employee Bobbie Smith came into the plant and went to the tops and bottoms department, spoke to Bobbie Smith, Smith clocked out and they both left. Additionally, Mathis testified that in late March 1992 the husband of Respondent's employee Sherry Chism dropped her off inside the gate in the parking lot even though he was not supposed to enter the parking lot. On further redirect, Mathis testified that the visits of Weatherspoon occurred before Jackson's visit to the plant.

With respect to nonemployees in the plant, Knighten testified that her sister has come into the plant several times; that Weatherspoon has been in the plant several times; that she did not know what door the Moody people used to enter the plant but they were in the cafeteria one time during lunchbreak; that Rebecca Carroll's children had lunch with her one day in the cafeteria during spring break; that Beverly Burford brought her children to the plant on the day of the one of the elections; and that things have changed regarding people coming into the plant since Jackson's visit. On cross-examination, Knighten testified that she was a union supporter and has worn the red union T-shirt and union buttons; that after she heard the people saying that the door was locked she looked into the lobby and saw Gary Smith trying to open the door between the lobby and the offices; that the very first time she heard anyone say that the door was locked was after Jackson was already in the lobby; that her sister, Brenda McNeil, came into the plant in 1990 and came to Knighten's work station; that no one escorted her sister out of the plant; that Supervisor Barbara Moody saw her sister in the plant and her sister and Barbara Moody were talking; that Knighten's assistant supervisor, Earleen Snyder, also saw McNeil in the plant; that she could not recall how many times her sister came into the plant; that before Jackson's visit she saw Weatherspoon in the plant in 1991 almost every day in the timeclock area; that when she saw Weatherspoon in the timeclock area, the door between that area and the lobby was closed; and that she never actually saw Burford's children in the plant.

Regarding nonemployees in the plant, Burnette Glenn testified that the Moodys came into the plant; and that her son-in-law came into the plant through the employee entrance a couple of years back from the time she testified herein, namely, March 31, 1992. On cross-examination, Glenn testified that she saw Delores Knighten's sister in the plant in Colleen Bonanno's department during the lunch hour; that

she has seen the Moodys in the plant for a number of years; and that she did not think she was aware of a company policy which prohibited nonemployee from coming into the plant area prior to Jackson's visit because she saw many people coming and going and any prohibition was not enforced like it was after the Jacksons visit.

With respect to nonemployees in Respondent's plant before Jackson's visit, Mary Smith testified that a former supervisor used to come in on Saturdays; and that a man used to come into the plant a lot to see one of the Moody girls who worked up front. Additionally, Mary Smith testified that around mid-March 1992 Bobbie Smith's sister came into the plant. On cross-examination, Mary Smith testified that she saw the former supervisor, Linda, on Saturdays; that she used to see Diane Moody's boyfriend everywhere in the plant, such as in the lunchroom or in the timeclock area and for a while she thought he worked there; and that she saw Bobbie Smith's sister in the tops and bottoms department when she came to get Bobbie and they left. On redirect, Smith testified that since Jackson's visit, she did not see Diane Moody's boyfriend in the plant at all.

With respect to nonemployees in Respondent's plant, Williams testified that she once saw Eskridge's predecessor in the plant; that she saw James Young's wife come into the plant to speak to Burford; and that she saw Diane Moody's boyfriend, Melvin, in the plant. On cross-examination, Williams testified that in the 2 years she worked at Respondent's facility she saw Diane Moody's boyfriend, Melvin, inside the plant by the timeclock only once.

Regarding nonemployee in Respondent's plant, Chase testified that her ex-supervisor, Glenda McCain used to come; that Bobbie Brown's husband has been in the plant; that Weatherspoon, Diane Moody's boyfriend, was in there daily; that when her brother-in-law passed away, before they went back to Chicago, the Moodys came into the plant to say goodbye; that the Moodys came in the same door through which Jackson entered the plant; that the Moodys' visit occurred in the summer of 1991; that Sherry Chism had her children in the plant lunchroom having lunch with her; and that it was never an issue before and that people always came and went from the employee entrance door before Jackson came but after Jackson's visit things changed. On cross-examination, Chase testified that she saw McCain in the plant a number of times; that she saw Bobbie Brown's husband in the plant just once; that she has seen Weatherspoon everywhere in the plant, including walking through shipping; and that she saw the Moodys in the timeclock area and she did not know if they were asked to leave by the Company but they, her family, never mentioned that was the case to her. Chase testified that Respondent's supervisors Virgil Gaines and Lynn Sears smoke in the lunchroom and some of the times they were in there they would have had to seen Weatherspoon in the lunchroom. Chase also included Robert Rivers in this group but she was not sure if he was a supervisor.

With respect to nonemployees in Respondent's plant, Margaret Davis testified that Diane Moody's boyfriend comes into the plant all the time; that Glenda McCain always comes in; that she has seen McCain used the same employee entrance that Jackson came through; and that plant manager James Young's wife came into the plant on one Saturday and

the employee who she spoke with, Burford, was not disciplined for having this visitor.

Respondent's supervisor, Barbara Moody, who had been a supervisor for 8 or 9 years with Respondent at the time of the hiring herein, testified that employees only are allowed in the plant, except when a nonemployee is authorized by a management official or is accompanied by a management official; that she has never seen Bobbie Brown's husband in the plant; that in June 1991 some of her relatives did come to the plant; that she saw three of them near the timeclock, told them that they should not be in the plant and accompanied them out of the plant; that when she took them out the front door there were several other relatives outside of the door which leads from the outside into the foyer; that everybody that has been at Earle for any length of time would know that visitors are not allowed out in the plant; and that she has seen nonemployee Weatherspoon in the plant by the timeclocks and she did not know whether anyone has run Weatherspoon out of the plant in the past. Regarding the visit by her relatives, Moody testified that there might have been others in the plant but she did not go back into the plant to check and she did not ask those with whom she spoke if some of the other visiting relatives were still in plant.

Regarding nonemployee in the plant, Respondent's supervisor, Jimmy Farmer, testified that when the Moody relatives visited, he did not speak to any of them in the shipping department itself; that when out-of-town members of the Moody family visited the plant, he spoke with one of them in the foyer and then he went outside or outdoors with them by the visitor entrance; that a number of the visiting relatives were outside the visitors' entrance; that he was out there talking to them for about 15 or 20 minutes; that it was during the lunchbreak; that he walked them to their cars in the parking lot; that he then went into the shipping department; that none of the visiting Moody relatives came into the shipping department with him; that he did not know whether the Company had a rule about nonemployees in the plant but at the entrances the Company has signs indicating "No Soliciting Employees Only"; that 2 or 3 years ago he told a nonemployee who came through the shipping entrance that he would have to go back out the entrance and go around to the front office; that he heard that some of the members of the visiting Moody family were around the timeclock but he did not see them; that Supervisor Lynn Sears escorted Weatherspoon out of the lunchroom when he, Weatherspoon, was talking to Farmer about getting a job and Sears told Weatherspoon that he was not supposed to be in the building; and that he saw Shipping Supervisor Duke Miller take nonemployees outside. On cross-examination, Farmer testified that he did not escort Weatherspoon out because Weatherspoon had been drinking and he, Farmer, was trying to get Weatherspoon to collect himself; that this happened 2 or 3 years ago; and that Weatherspoon is married to Diane Moody.

Assistant Supervisor Bobbie Brown testified that Respondent has a rule that nonemployees can not come into the plant and if they need to see an employee they must go to the front office; that she advised her husband and her son, from day one about this rule; and that neither her son nor her husband has come into the plant area.

With respect to nonemployees being in the plant, Felsenthal testified that he has routinely granted former supervisor Glenda McCain permission to visit out in the plant; and that it was his understanding that when McCain visited the plant on Saturdays she would be authorized by Plant Manager James Young to go into the plant. Felsenthal also testified, with respect to the rule as it existed on October 1, that it was enforced and that there have been cases, he could not recall the specific individuals, where Supervisors Duke Miller or Jimmy Farmer have told people to go back outside and came around through the front office; and that there have been cases where Gary Smith has had to deal with people who are in the plant without authority.

Gary Smith testified, when called by Respondent, that Respondent does have a rule prohibiting nonemployees from coming into the plant; that the only thing that was added after Jackson's visit is that nonemployees who do not have business with the Respondent are not allowed in the parking lot; and that, as indicated in Respondent's Exhibits 29 and 30, which are photographs of signs on doors leading into the plant, only employees are to use these entrances. It is noted that, according to Respondent's Exhibit 29, the sign next to the doorway through which Jackson entered the plant reads "EMPLOYEES ONLY NO VISITORS NO SOLICITING." When asked by counsel for Respondent to cite instances prior to October 1 when nonemployees were not allowed in the plant, Smith testified that he asked Weatherspoon to leave the plant when he came in to see Diane Moody; that on one occasion he asked Weatherspoon to leave the plant when he came into the plant with Van Welch, who is an employee of Respondent; and that when employee Rudy Stevenson came into the plant on a Saturday, which was his day off, he, Smith, asked Stevenson to leave the plant, telling him that employees who are not working are not allowed to be in the plant during work hours. Smith testified that employees know of the rule because it is something he covers in orientation. With respect to employee Bobbie Smith having a nonemployee visiting her in the plant, Gary Smith testified that as indicated in his memo to file dated March 19, 1992, Respondent's Exhibit 31, Bobbie Smith did not know that the nonemployee was coming into the plant area. And, with respect to the Moody visit in June, Smith testified that he drafted a memo to file dated November 11, Respondent's Exhibit 32, after the Board commenced its investigation of the Wallace discharge. The memo indicates that Respondent's employee Lillie Moody asked four of her relatives who were in the plant next to the timeclocks to return to the foyer area. On cross-examination, Smith testified that he spoke to Barbara Moody about the Moody family visiting incident and she told him that she had no personal knowledge of the incident; that Barbara Moody referred to him to Lilly Moody; that Lilly Moody advised him that she told certain members of the Moody family to go back through the door into the foyer area; that he spoke to Diane Moody and Van Welch about Weatherspoon after October 24; and that he could not recollect any employee who was issued a warning for having visitors in the plant before October 24. On redirect, Smith testified that while he did not recall any employee receiving a warning for having visitors in the plant prior to October 24, there were incidents where nonemployees and employees off duty were ejected from the plant prior to that.

When called by Respondent, Gary Smith testified that on October 8 he took statements from Maggie Lucas and Frances Jones, General Counsel's Exhibits 7(e) and (f) respectively; that he actually sat with these ladies while their statements were given; that the statements were given on the morning of October 8 probably around 7:30 or 8 a.m.; and that he gave the statements to Felsenthal later that morning. On further direct examination by counsel for Respondent, Smith testified that he was not sure when he took Lucas' and Jones' statements; that he talked with them and had them write their statements afterwards; and that he could not remember the specific date when the statements were given back to him. And on cross-examination, Smith testified that he could not recall whether he spoke to Maggie Lucas and Frances Jones in the morning or the evening of October 8.

Lucas testified that the statement she gave Gary Smith on October 8, General Counsel's Exhibit 7(e), is true. In this statement Lucas indicates that Wallace kept waving for Jackson to come on in the office. On cross-examination, Lucas testified that she gave the statement on the morning of October 8 but she was not sure of the time.

On October 8 Jones gave a statement to Respondent, General Counsel's Exhibit 7(f), which, as she testified herein, was true. In the statement Jones indicates that Wallace kept hollering and telling Jackson to come this way while clapping her hands. She testified that she could have given the statement to Smith on the morning of October 8.

A memo dated October 16 from Smith to Felsenthal, General Counsel's Exhibit 7(b), refers to discussions Smith had with specified employees, indicating that one of the employees was not in the area of Jackson and Smith. The memo goes on to indicate as follows:

The other individuals indicated that they saw no other persons attempting to direct Rev. Jackson to the office up front. They indicated that they could hear me talking. They were caught up in the emotion of the time—observing Rev. Jackson, who is a national figure, and the emotion of the crowd. They indicated that they were in the area because they had an interest in seeing Rev. Jackson.

Regarding his October 16 memo to Felsenthal, Smith testified that it did not reflect that he interviewed Marilyn Mathis; that it does indicate that he spoke with seven named employees; and that he did not tape record the interviews of the seven named employees and, therefore, he did not make transcripts of these interviews.

When called by Respondent, Smith testified with respect to his October 16 memo to Peter Felsenthal, General Counsel's Exhibit 7(b), that as indicated in the memo on October 15 and 16 he talked with Debbie Evett, Mary Dorsey, Sandra Williams, Teresa Winfrey, Anita Proctor, Rachell Smith, and Joe Blockman; and that the discussions with these individuals did occur on October 15 and 16.

A file memo from Felsenthal dated October 16, General Counsel's Exhibit 7(c), indicates that it was concluded that except for Wallace there was no convincing evidence to justify disciplinary action regarding any other employee. The memo concludes: "[i]n general, other employees were merely observing what was going on and reacting emotionally to victory that Rev. Jackson and Earle Wallace had achieved

over the management authority of Gary Smith.” A number of the employees gave affidavits to Respondent. See General Counsel’s Exhibits 8 and 7(d), 7(e), 7(f), and 7(g).

By letter dated October 17, the acting Regional Director for the Board’s Region 26 advised Earle that after carefully investigating its charge in Case 26–CB–2879 against the Union with respect to what occurred on October 1, he had decided not to issue a complaint in this matter. Pertinent portions of the letter read as follows:

Concerning this initial speech by Jackson in the parking lot, the evidence established that it occurred in a non-work area during a non-work time. The investigation additionally disclosed that other non-employees are allowed into the parking lot during employees’ lunch period i.e., vendors, friends, relatives, etc. Additionally, the evidence submitted during the investigation, including all videotapes submitted by the parties, reveals an absence of any 8(b)(1)(A) conduct expressed verbally by the union or its agents.

The evidence established that no manager or official of the Employer admonished the Union or its agents to leave the Employer’s property prior to law enforcement officials doing so. Thereafter, the Employer successfully asserted its property rights when law enforcement officials aborted Jackson’s speech, drove the truck on which Jackson and several employees were standing off the Employer’s property, and effectively evicted union representatives Duane Stillwell and Michael Holdway by having them arrested. The investigation disclosed that the Employer did not uniformly evict all non-employees from its property, rather it chose to evict only the Union and its agents.

...
contrary to the Employer’s position that the Employer asked Jackson to leave after he entered the plant, videotapes provided by the Employer demonstrate that the Employer did not ask Jackson to leave the property, rather, the Employer merely requested Jackson to enter the facility by another door. . . .

...
of equal importance, there was no showing in the instant case that Union’s unauthorized presence on the Employer’s property or Jackson’s brief (approximately two minute) entry into the plant, resulting in a disruption of employees’ work, other than to momentarily delay certain employees returning to their work stations following their lunch break. The evidence submitted during the investigation disclosed that said employees were in the minority and returned to their work stations anywhere from 30 seconds to 4 minutes late. No employee was disciplined for their returning to their work area late after lunch on October 1, 1991.

On about October 18, or, as indicated by Mathis, about 1-1/2 or 2 weeks after Wallace was discharged, Gary Smith had Mathis brought to his office. Regarding this meeting, Mathis testified that only Smith and she were present; that Smith asked her if she saw Jackson coming on to the parking lot; that Smith asked her if she was in the hall when he and Jackson were talking and if she could overhear the conversation to which she answered yes on both counts; that he asked

her what was said and she told him that she had no comment; that he asked her something about the microphone to which she replied that it was unplugged because in her opinion management did not want employees to hear what Jackson had to say; that Smith asked her if she knew that the employee entrance was for employees only and she told Smith that it may or may not be for employees only but more than employees used the door; and that Smith said that he would not ask her to give names and she told Smith that she would not give names at that point in time anyway. Mathis further testified, with respect to this interview, that Smith did not tell her that he was going to tape record the conversation; that she did not remember Smith giving her an assurance that anything she said in that interview would not impact on her job or that there would be no discipline involved; that she recalls refusing to answer some of Smith’s questions; that she was not warned for that; and that she was not told that she was refusing to cooperate in an investigation of a possible infraction of the company policy.

With respect to his interview of Marilyn Mathis on October 18, Gary Smith testified that he did tape record her interview; that he did not tell her that he was tape-recording her interview; that he picked and choose who he was going to record; that he did not only tape union advocates; that he erased Mathis’ tape; that Mathis and Wallace were known union advocates; that only two employee’ interviews were tape-recorded regarding the October 1 incident; and that they were Wallace and Mathis.

Regarding the interview of Mathis on October 18, Felsenthal testified that Gary Smith advised him that Mathis declined to cooperate; that he agreed with Smith that there was no need to press Mathis on the issue; that had Wallace not been terminated at that point in time and Mathis refused to answer some questions with respect to what occurred on October 1, then there may have been some basis for a possible violation of company policy of failing to cooperate; and that he thought Mathis had a legitimate reason for not responding to questions that she believed were directed toward the conduct of Wallace. Felsenthal testified that after Smith had conducted the Mathis interview and after he, Felsenthal, had placed a memo in the file indicating that he did not believe any further disciplinary action was warranted other than with respect to Wallace, there was some indication in one of the employee statements that Mathis had pointed to the office door. The statement in question was notarized October 17 and it is included in the statements received here in as General Counsel’s Exhibit 8. Felsenthal also testified that a review of the involved video lead him to conclude that Bowers, who raised her arm with a clinched fist in the vicinity of the employee entrance door just before Jackson went through it, was not pointing in the direction of the employee entrance door; and that he did not observe any of the Respondent’s other employees actually trying to encourage Jackson to come into the plant or to defy Smith.

When called by Respondent, Gary Smith testified with respect to the October 18 interview of Mathis, that while she did not answer some of his questions, she was not fired because she cooperated in the majority of the interview to a point when she simply said “I can’t say”; that as far as he was concerned at that point she was probably attempting to protect someone else; that at that time Mathis was not herself implicated in anything; that he did not believe at that point

that she had done something which was inappropriate; that to his knowledge Mathis did not lie or was she untruthful in the interview that he had with her; and that he did not tape-record the interviews of other employees during this investigation, which other specified employees were union supporters. On cross-examination, Smith testified that he records interviews where the people have a propensity to be untruthful or their statements could be confusing; that he recorded Mathis' interview even though she had never had been discredited by anyone in any formal proceeding, and she had no documentation in her personnel file with respect to incidents of discipline regarding matters which were her fault; that none of the employees which he interviewed who he believed were union advocates were on the back of the flatbed truck in the parking lot with Jackson; that Mathis was on the flatbed truck; that the strongest union proponents were on the back of the flatbed truck with Jackson; that when he interviewed Mathis she indicated that she could not provide certain information; that he did not keep the tape of his interview with Mathis; that Mathis answered every one of his questions up to a point where she said "I can't say"; that at this point he could see that it was not going to go any further and he said "Fine. I won't ask any more questions"; that in his mind that this constituted full cooperation with the investigation; and that he believed the incident when he recorded a part of a meeting with Supervisor Larry Atkins occurred after the election, apparently referring to the October election. On redirect, Smith testified that he recorded his interview with Mathis because he wanted to be sure that he heard everything correctly and "it was getting to be a lengthy session with her"; and that he did not tape her because she was one of the employees on the flatbed with Jackson.

Both Chase and Davis testified that while they were on the back of the flatbed truck while Jackson gave his speech, they were never interviewed by Respondent's management regarding their conduct.

Felsenthal testified that no other employee, other than Wallace, was disciplined for the October 1 incident. According to Felsenthal's testimony, if another employee had significantly interfered, through pointing, with Gary Smith's efforts to have Jackson discontinue his trespass, then Respondent would have conducted an investigation of that individual's conduct. Felsenthal testified that he asked Smith to interview Mathis; that Smith told him that Mathis refused to answer certain of Smith's questions; and that Van Welch's affidavit to Respondent, which is included with the affidavits received here as General Counsel's Exhibit 8, states on the last page thereof:

Some of the employees were pointing towards the office door, in order to show Rev. Jackson the way to the office. These employees that were pointing towards the office door, were Earley Wallace, Marilyn Mathis, and Linda Davis.

According to Felsenthal's testimony neither Marilyn Mathis nor Linda Davis was disciplined nor were they, to his knowledge, counseled. Van Welch's affidavit is dated October 17.

Regarding Respondent's disciplinary procedures, Felsenthal testified that discipline works on a case-by-case basis and the only standard progressive disciplinary process Re-

spondent has is with respect to absenteeism; and that that progressive disciplinary policy is covered in the employee handbook. Felsenthal sponsored a number of exhibits, Respondent's Exhibits 6 through 12 and 17, which deal with terminations, collectively, for fraud, theft, falsifying documents, and giving false information regarding an injury. Felsenthal also testified about and he sponsored Respondent's Exhibits 13, 14, 15, and 16, collectively, dealing with employees who cursed at a supervisor and later refused to follow the supervisor's instructions, an employee who was placed on probation after being incarcerated and who thereafter refused to follow a supervisor's instructions, an employee who during his probationary period missed work without documentation, came in late the following day, and did not pick up his timecard, an employee who fired a handgun at her husband in the foyer of the plant and shot one of the supervisor's cars and an employee who engaged in sexual harassment during his trial period.

The Rules of Conduct which are included in Respondent's employee handbooks, Respondent's Exhibit 18, specify that "violation of any of the following rules will subject an employee to disciplinary action up to and including immediate discharge." The fourth Rule of Conduct reads: "Failure to cooperate in an internal investigation." Felsenthal testified that these rules were in the handbook that was in effect on October 1; that anytime there is a change or new provisions are issued, they are provided to all employees; and that, as evidenced by Respondent's Exhibit 19, Wallace acknowledged her receipt of the Rules of Conduct part of her handbook. On cross-examination, Felsenthal testified that the policy regarding nonemployees visiting inside the plant before October 1 had not been reduced to writing except for the posters or signs on the perimeter of the plant.

Gary Smith also testified, with respect to Respondent's disciplinary procedures, that while Respondent does consider, in dealing with a disciplinary matter, a history of disciplinary problems of the individual, Smith did not consider this to be progressive discipline in the normal sense of the word because Respondent's approach is on a case-by-case basis.

With respect to the aforementioned terminations for firing a handgun in the foyer of Respondent's facility, for attempting to file a false claim on workers compensation, for filing duplicate insurance claims, and for falsifying documentation regarding an absence, all of the involved employees were terminated without any progressive discipline, according to Smith's testimony.

By memo dated October 23, Felsenthal and Smith advised all employees that the following rule was to be effective immediately:

No non-employees or non-employee vehicles will be allowed on Company property at any time, except those persons in vehicles having business with the Company in the ordinary course of the Company's business, such as truckdrivers delivering or picking up raw materials, finished products or supplies, postal and delivery services, buyers, suppliers, Company legal, financial and business advisors, and the like.

With respect to the memo to all employees dated October 23, Felsenthal testified that those posted on the bulletin board had the following sentence which apparently did not appear

in the ones handed out to the employees for inclusion in their handbook: "We do not want this new rule, but there is simply no other way to prevent third parties from blocking our entrances and invading our work areas."

On October 24 Respondent's appeal from the acting Regional Director's refusal to issue a complaint in Case 26-CB-2879 was denied. General Counsel's Exhibit 34.

Respondent's Exhibit 26, which is a memo to file from Gary Smith dated November 1, refers to the aforementioned incident involving Hicks. Regarding the incident, Smith testified that he met with Hicks on October 31; that he asked Hicks four or 5 times what was in the package and each time Hicks refused to answer; that when he told Hicks that if he refused to cooperate he could face termination, Hicks said it was table salt; and that Hicks said he was sorry for acting that way. The memo to file indicates that "[h]e [Hicks] was still not convinced [after talking with Smith] that he was at fault." Smith testified that Hicks had a five-day suspension. Smith's memo to file indicates that Hicks was suspended for 3 working days. Smith pointed out that he did not tell Hicks during his investigatory interview that he already knew that the substance was salt.

Wallace gave an affidavit to the Board on November 5. With respect to the affidavit, she testified on cross-examination that the affidavit is mistaken where it indicates that Burnette Glenn was hired about 3 or 4 weeks before they fired Wallace; that the affidavit is an error where it indicates that she was saying "clock" not "lock"; that she told the Board agent who took her affidavit sometimes shortly after she gave her affidavit (she estimated that she made this revelation the week before Thanksgiving), apparently that she remembered saying locked and the Board agent said, "Well why didn't you tell me that when you were giving the statement"; that she told the Board agent who took the affidavit a few days after she gave the affidavit that she did not remember saying anything about a door being locked; that the affidavit is in error where it indicates that no one warned her during her October 8 meeting with Felsenthal that it was against company policy to refuse to cooperate with a company investigation or that she could be discharged for refusing to cooperate in that Felsenthal did warn her about refusing to cooperate during the October 8 meeting; and that she may have been mistaken in indicating in her affidavit that Gaines made an expression like she was clowning or it was rehearsed when Jackson passed her and her husband just inside the employee entrance to the plant on October 1. Also, on cross-examination Wallace testified that her affidavit was in error where she indicated that she did not say "go Jesse go" when he was in the foyer or front lobby of the plant since she was not sure whether she did or did not participate in this chant; that while Felsenthal gave her the opportunity to have a fellow worker with her in the October 7 meeting she did not tell the Board agent this; that her affidavit correctly points out that about 13 Moodys came into the plant through the front lobby and walked in the plant since some of the Moodys, Alma and her daughter, were in the shipping department while Jimmy Ray Farmer was there; that five of the Moodys were in the clocking area about 11:45 a.m. that day; that Melvin Moody was in the lunchroom with Diane; that there were children with the Moodys but she did not know their names; and that while her affidavit indicates that she did not have anything to do with what Gary Smith and

Jackson were talking about, she guessed that her saying that the front door was locked did have something to do with what Smith and Jackson were talking about.

Regarding Wallace's November 5 affidavit, General Counsel's Exhibit 12, it is noted that in it she states that "I told him [Felsenthal] again that I wanted someone in with us to represent me who could understand what he was asking me. Felsenthal told me, 'you don't need anyone in here, I'll get one of the workers to sit in here while you talk' or something similar." The affidavit also contains the following statement of Wallace:

I can't remember saying anything about a door being locked while Jackson was coming down through the aisle in the plant, though I remember when Smith was trying to open the door from the lobby to the front office that the door was locked. [A]nd I seem to recall saying something about the door being locked, but I don't remember saying anything like that in the aisle, though I might have said it—I just can't remember.

With respect to the memo to file dated November 11 from Gary Smith regarding employee Rebecca Knapp, General Counsel's Exhibit 17(e), Eskridge testified that she went to take some binding from Knapp to give to another employee with the understanding that she, Eskridge, would go in the back and get some more binding for Knapp; that Knapp knocked the binding on the floor and would not pick it up; that she, Eskridge, picked the binding up and told Knapp not to do that anymore; that Knapp indicated that she was sorry for her conduct; and that it is not true that Knapp disobeys her, Eskridge, all the time. Eskridge also testified about having to talk to employees Catherine Miller, Lucinda Johnson, and Dorothy Berry in 1991 (or possibly 1992 regarding Berry) when, respectively, they either had repairs and became upset, tried to avoid doing some work, or refused to sew a repaired bag. Eskridge did not give verbal or written warnings to any of the three employees and she pointed out that Miller and Berry are union supporters.

On April 27 and June 3, 1992, an unemployment hearing was held regarding Wallace's discharge. The transcript of the hearing was introduced herein as Joint Exhibit 2. The Arkansas Department of Employment Security found in favor of Earle Industries initially, the appeals tribunal found in favor of Wallace and the matter was pending on further appeal at the time of the hearing herein.

Analysis

Paragraphs 7, 13, and 14 of the consolidated complaint collectively allege that on March 15 Respondent discharged Cummings in violation of Section 8(a)(1) and 8(a)(3) and (1) of the Act.

General Counsel, on brief, contends that the assignment of Cummings to an inferior sewing machine was made with the intent to make her working conditions more onerous and Eskridge's repeated refusals to move her to a functional machine underscores this intent; that after Cummings' support became open and notorious on March 7, Eskridge instigated a confrontation with Cummings and the following week Cummings was discharged for low production; that prior to March, Cummings was steadily progressing in her production; and that Cummings' March 1 evaluation was never

shown to her or discussed with her and there is an obvious inference that this evaluation was prepared after the March 7 incident and backdated.

Respondent argues, on brief, that at the outset of her employment Cummings was informed that she would be terminated if she did not make production at a specified rate which was measured on an hourly basis; that Cummings' evaluations in November and December 1990 show that her production was less than the \$5.30 an hour minimum rate required by Respondent in 1990; that Cummings was terminated for failure to meet minimum production after an extended period; that Cummings did not tell Smith on March 15 that she had problems with her sewing machine; that Cummings was told she could reapply for employment with Respondent for a non-piece rate job but she has not reapplied for a position with Respondent; that Respondent has rehired several former trial operators and placed them into non piece-rate positions; that Respondent has terminated a number of trial operators, including a relative of the plant manager, for failure to make minimum production; that General Counsel has failed to make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to discharge Cummings on March 15; and that even assuming that General Counsel established a prima facie case of unlawful discrimination, Respondent has established that it would have discharged Cummings for low production notwithstanding any protected or union activity on her part.

Cummings was hired on July 16, 1990, on a 90-day trial-period basis with the understanding that Respondent could, if it wished to do so, extend the trial period. Cummings conceded that when she was hired Respondent gave her written notice that if she did not reach a productive level at the end of 30 weeks, Respondent would have no choice but to terminate her. When she was hired, the expected production rate was \$5.30 an hour. To graduate from being a trial-period operator, Cummings would have had to meet the production rate for 4 weeks. In the 35 weeks Cummings worked for Respondent she reached the production level for only 1 week, namely her 21st week, which was the first full week in December 1990. Immediately thereafter, however, and continuing for the next 2 weeks her production dropped by more than \$1 an hour. Even though she brought her production up some, she never again met the required rate, which was increased in 1991 to \$5.60 an hour. As noted, Cummings' production rate regressed in her 22d week, which ended December 14, 1990. This was well before she was moved to her second sewing machine by any account and it was well before Cummings became involved in the union organizing campaign.

With respect to Cummings' second sewing machine, some of the testimony of General Counsel's witnesses appears to be contradictory, i.e., there is testimony that Cummings complained about the machine two to three times a day and there is testimony that Cummings complained two to three times a week. Some of the testimony of Respondent's witnesses is contradictory regarding whether the mechanic was called once or more than once to repair the involved machine. As noted above, Cummings' production dropped well before she was moved to the second sewing machine. Undisputed documentary evidence introduced by Respondent shows that, col-

lectively, other sewers, including Isabell Thompson,⁴ met production using the involved machine both before and after Cummings used it. Respondent had cause to terminate Cummings. She had not met production even though she had been sewing for 35 weeks. There was no showing that Respondent regularly employs trial-period operators even though they do not meet production in a 35-week period. The one exception covered by General Counsel occurred in 1985. The minimum introduced by General Counsel, General Counsel's Exhibit 28, reads in pertinent part: "[t]his extension [in April 1985] ended June 10, 1985, at which time we were confident that you were capable of reaching and maintaining your production level so we extended your time once again." Without knowing the specifics regarding that employee's production and putting aside for the moment the possibility that probationary period policies back in 1985 may have been different for piece-rate operators, one cannot conclude that if Respondent were confident that that employee, Berry, was capable of reaching and maintaining her production level, it should have also been confident that Cummings was capable of reaching and maintaining her production level. As noted above, Cummings' production dropped by more than \$1 an hour in her 22d week which was well before she was moved to the second sewing machine. She only reached her production level 1 week in her 35-week period. Respondent's Exhibit 35 demonstrates that Cummings did not steadily improve her production over the 35-week period. More than one of Respondent's witnesses testified that Cummings had a poor sewing technique and she was either unwilling or incapable of changing her technique for other than a short period after she was counseled. Perhaps this would be why Respondent would not be confident that Cummings was capable of reaching and maintaining her production level. Without knowing the specifics regarding the Berrys' production and probationary period practice in 1985, it cannot, in my opinion, be concluded that Cummings was treated disparately.

While, according to General Counsel's ease, the performance of the second sewing machine to which Cummings was assigned was critical, General Counsel, other than Cummings herself, did not call one witness who actually used that machine either before or after Cummings used it. The names of the people who had used the machine were not a secret. They appear throughout the record. Respondent's documentary evidence that all of the specified employees who used the involved machine before and after Cummings, including Thompson, made production was not refuted by General Counsel or the Union. Perhaps that machine was not as fast as some of Respondent's other machines. But did whether or not an operator made production on that machine turn on the machine or the operator. The record herein points to the latter; all things considered it was the operator and not the machine. Cummings' above-described claim form for unemployment benefits, which she filed 25 days after her termination, demonstrates that at that point in time she did not blame the machine or at least did not feel strongly enough to explain that her low production was allegedly the fault of the machine. As indicated above, others who used the machine

⁴Thompson complained about the machine after Respondent made same changes in it to accommodate wider binding. Eventually adjustments were made. Nonetheless, Thompson still made production.

made production. I did not credit Cummings that she mentioned the machine during her March 15 termination interview.

General Counsel contends that Cummings' union activity or sympathies was a motivating factor in Respondent's decision to discharge Cummings. The March 7 verbal exchange between Cummings and Eskridge is cited in support of this position. As noted above, Cummings took notes and asked Felsenthal questions during the March 7 employee meeting. Even if Felsenthal and Gary Smith do not recall this, Eskridge does. She also recalls that there was a subsequent verbal exchange between herself and Cummings, although she is vague with respect to the details. General Counsel's witnesses are credited regarding this incident. Eskridge made a point of discussing the Union and production with Cummings in front of other employees on the plant floor. Eskridge provoked Cummings and in the heat of the moment both she and Cummings lost control.⁵ If there was any doubt about whether Cummings supported the Union it was removed the next day, March 8, with the union flyer, which flyer was distributed on March 8 at Respondent's facility and which flyer contained a picture of Cummings, among other employees, and Cummings' written statement explaining why she supported the Union.

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 989 (1982) (approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)), the Board set forth the following causation test in cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation:

First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [Footnote omitted.]

⁵ The Union did not file a charge alleging that either Eskridge's conduct on March 7 or the warning Eskridge drafted with respect to the March 7 occurrence violated the Act. And since the Union waited until September 11 to file a charge over Cummings March 15 discharge, the Union itself created a situation where this matter, the March 7 incident and the March 7 warning, fell beyond the 6-month statutory period covered by the Union's charge. Nevertheless, evidence concerning the above-described March 7 occurrence and warning can be considered on the issue of motive. If what occurred on March 7 was misconduct on Eskridge's part, does it supply a motive? Does it demonstrate union animus? In my opinion Eskridge has a temper. If, as Wallace asserts, Cummings and Mary Smith were snickering during the employee meeting, then there would have been a question as to whether they were being disrespectful and there would have been a question of why they behaved that way, especially if one was a long-time trial-period operator who had not yet met the 4-week production standard. (As indicated by Judge Learned Hand in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), "[i]t is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.") In the circumstance existing here, I do not believe that what occurred on March 7 either supplies an unlawful motive or demonstrates union animus.

The only current allegations⁶ that Respondent violated the Act of which I am aware are those involved herein. If there are others, they were not made a matter of record herein nor was I requested to take judicial notice of any violations. Consequently, for the purpose of determining whether a prima facie case of unlawful discrimination has been established, only the conduct of Respondent covered herein will serve to illustrate whether or not there is animus on the part of Respondent toward the Union and its supporters.

It appears that Respondent was aware of the fact that Cummings supported the Union when it discharged her on March 15. Gary Smith admitted he had seen the aforementioned March 8 union flyer. But is what occurred on March 7 and the March 8 flyer sufficient to warrant any inference that the Cummings' union support was a motivating factor in her discharge?⁷ Consideration must be accorded the fact that on March 15 Smith told Cummings that she was welcome to reapply for a non-piece rate position. As noted above, other operators who could not make production have been hired by Respondent for non-piece rate positions. Also, Respondent hired employees during the pertinent time. Cummings admits that Gary Smith told her she was welcome to reapply but she chose not to reapply for a non-piece rate position.

In the circumstances existing here, I do not believe that counsel for General Counsel has demonstrated that an inference is warranted that Cummings' concerted protected activities or union sympathies or activities were a motivating factor in her discharge. And even assuming, arguendo that such was the case, in my opinion the Respondent has demonstrated that it would have discharged Cummings for her low performance even if she was not a union supporter and had not engaged in any protected or union activity. Cummings' discharge did not violate Section 8(a)(3) and (1) or Section 8(a)(1) of the Act as alleged.

Paragraphs 9, 10, 13, and 14 of the consolidated complaint herein collectively alleged that Respondent violated Section 8(a)(1) and Section 8(a)(3) and (1) of the Act by suspending Wallace on October 7 and terminating her on October 8.

General Counsel, on brief, argues that Respondent's actions in discharging Wallace appear very heavy-handed; that Wallace may have been slightly more noticeable than the others but she was not acting alone; that the employees wanted Jackson to speak with Felsenthal and Wallace was just one of many encouraging him; that Wallace's conduct on October 1 was not an unprotected act of insubordination, but was an integral aspect of hers and her fellow employees' protected concerted activity; that Respondent's intentions to "entrap" Wallace during her October 7 interview were overt; that the prepared questions, the consultations with counsel and the "out-of-view" recording does not indicate an open-minded fair meeting but rather a well choreographed

⁶ The other aforementioned cases of either an alleged violation or a violation by Respondent of the Act with respect to Wallace are, in my opinion, too remote in time to establish antiunion animus.

⁷ By documentary evidence, Respondent demonstrated that a number of other employees had not signed evaluations or warnings. And the assertion that Eskridge possibly looked into Cummings purse and saw a union authorization card in the presence of Cummings and other employees is not convincing.

plan to establish a pretextual discharge;⁸ that all the elements of a discharge due to protected concerted activity are present, namely, the protected concerted activity, the company knowledge, disciplinary action due to the conduct, timing and blatant disparity;⁹ that Wallace was also discharged due to her union activities; that it was not the first time Wallace had been discharged by a Felsenthal; that Wallace did not significantly interfere with Smith's management authority nor was she insubordinate; that Wallace may have interrupted Smith, but Respondent's characterization amounts to embellishment; that Jackson's eventual arrival at the office door could better be laid at the Dorseys' doorstep or better yet, Smith; and that Wallace's refusal to answer the initial interview questions was a continuum of protected activity, as was her cooperation or lack thereof, in the remainder of the interview.

Respondent, on brief, argues that the 8(a)(1) allegation should be dismissed since the grounds for Wallace's discharge did not include any protected or concerted activity engaged in by Wallace on October 1 or October 7; that even assuming, *arguendo*, that Wallace was engaged in concerted activities, the termination of Wallace was still not violative of Section 8(a)(1) of the Act, since Wallace's conduct took her outside of the Act's protection; that employee rights are not absolute, since they must be balanced against the employer's long-recognized right to maintain order and respect; that the 8(a)(3) allegations should be dismissed since General Counsel has failed to establish that Wallace's protected or union activity was the motivating factor in the Employer's decision to suspend and terminate her employment; that even

assuming *arguendo* that General Counsel has made a *prima facie* showing, the Employer has established that it would have suspended and terminated Wallace in the absence of union conduct; that it is well established that an employer does not violate Section 8(a)(3) of the Act where the employer discharges an employee for insubordinate behavior, especially where the insubordination is directed to a high-ranking company official in the presence of other employees and the employees' behavior was not provoked by the manager; and that even assuming, *arguendo*, that the employer violated the Act in suspending and discharging Wallace, reinstatement would be an inappropriate remedy under the circumstances of the instant case since the conduct which led to Wallace's discharge was flagrant and/or extreme and since Wallace was untruthful in her testimony during the unfair labor practice hearing and in her Board affidavit.

About 50 years ago the Supreme Court in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945), in dealing with the balancing of the right of self-organization and the right of employers to maintain discipline in their establishments, stated:

Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

⁸Contrary to General Counsel's assertion on brief, the way the October 7 interview of Wallace by Felsenthal was conducted does not demonstrate a well-choreographed plan to establish a pretextual discharge. Rather, it demonstrates, on Respondent's part, a methodical approach taken to protect itself as much as possible under the circumstances when it knew that it was dealing with someone who was both untruthful and who would, upon her discharge, file a charge with the Board.

⁹General Counsel submits that Mathis refused to answer Gary Smith's questions during her investigatory interview. Bowers made an encouraging gesture as Jackson proceeded toward the employee entrance, Mary and Dorothy Dorsey pointed to the office door during Smith's conversation with Jackson and later in October, Hicks, who initially refused to speak to Gary Smith about some salt wrapped up in foil, was suspended instead of being discharged even though the memorandum covering the incident indicates that Hicks did not believe that he was at fault. Contrary to General Counsel's assertion, Respondent did not engage in a blatant disparity. Mathis was truthful during her interview. She was not the target of the investigation, to the extent that she did not cooperate it was not meaningful and, as concluded by Respondent's management, she was protecting someone else. No reasonable interpretation of Bowers' gestures would, in my opinion, lead one to conclude that she specifically, in any way, caused Jackson to enter the plant through the involved employee entrance. With respect to the conduct of Mary and/or Dorothy Dorsey, as shown on the involved video, even if it rises to the level asserted by General Counsel, and, in my opinion, this conduct, which occurs in the background, was not shown to rise to that level, it comes nowhere near the conduct of Wallace which was clearly and unequivocally depicted on the involved video. Finally, regarding Hicks, it is noted that he was not untruthful during his interview and that he eventually made an admission. He may not have been as repentant as he should have been but when all factors are considered neither Respondent's treatment of Hicks nor its treatment of the other above-described employees demonstrates that Respondent treated Wallace disparately.

Was Wallace engaged in protected concerted activities in an attempt to organize Respondent's employee Jackson's visit to Respondent's facility on October 1 was obviously to assist Respondent's employees in their attempt to organize. Jackson brought media attention to the situation. He spoke to the employees. And he spoke with Felsenthal about the employees' attempt to organize. What occurred in general on October 1 was a concerted activity for the purpose of organizing.

But did Wallace forfeit the Act's protection by her conduct on October 1? In my opinion she did.

Before Jackson entered the plant, two union employees were arrested and placed in handcuffs. This occurred in the open by the highway in front of Respondent's parking lot and there is no reason to believe that those present, including Wallace, were not aware of about was happening. The video shows Wallace walking near the police car which held the two arrested individuals. When Gary Smith stopped Jackson in the aisle in the plant and told him for first time to go back out the employee entrance and go around to the front door of the plant, Wallace stated "[f]ront door locked," "come on." While it might be argued that the first time Wallace made this statement it was spontaneous, I do not believe that to be the case. There is no evidence of record that the front door was locked. It is normally left unlocked at this time of day. And there is evidence that it was not locked on October 1. When Wallace said that it was locked the first time it was a misstatement. Why did she make this misstatement? She claims that while outside the plant she heard someone say something about a locked door and she presumed that it was

the front door which was locked. No other witness¹⁰ corroborates Wallace regarding Hill saying anything about a door being locked while Wallace was outside the plant. Wallace was a totally unreliable witness. She lied before in a Board proceeding. She lied in her affidavit to the Board in this proceeding. And she lied while testifying herein. Wallace wanted Jackson to continue walking through the plant notwithstanding the fact that it would have been obvious to a reasonable person that Gary Smith, Respondent's personnel manager, by what he said and by his body language, wanted Jackson to go back out the employee entrance. Eventually Jackson did go and wait outside the front door. But at this point in time it was obvious that Jackson was relying on what Wallace was saying for after Wallace said "front door locked" Jackson refused to go out the employee entrance unless Smith accompanied him. In other words, Jackson, relying on what Wallace was saying, apparently believed he would be locked out of the plant if they locked the employee entrance behind him and so he asked Smith to accompany him. But for Wallace's statements, I believe that Jackson would have gone, as he subsequently did, to the front door. Wallace's first statement that the front door was locked was not a spontaneous or impulsive statement. Wallace impressed me as being a very calculating individual. This was a calculated statement. As she subsequently demonstrated, no matter what Smith said or did Wallace wanted Jackson to proceed through the plant and this was her way of achieving that.

After Wallace made this statement Gary Smith said "[n]o ma'am." Again Wallace was totally aware of what was happening. She had begun to move toward the office and with Smith's statement she stopped. Notwithstanding Smith's statement and his obvious attempts to get Jackson to leave through the employee entrance, Wallace again attempted to get Jackson to continue through the plant to the office by saying for a second time "[f]ront door locked." The fact that she said this a second time even after Smith said "[n]o ma'am" demonstrates the deliberate and defiant nature of Wallace's approach. Assuming *arguendo* that Wallace's first statement that the front door was locked is found to be impulsive or spontaneous, there is no question in my mind that what Wallace did after that on October 1 was not spontaneous. As shown by the video, and as summarized above, Wallace continued her deliberate and defiant conduct. Wallace engaged in insubordinate conduct toward Respondent's personnel manager on the plant floor in front of many other employees, with television cameras rolling. What occurred had to have a negative effect on Smith's status in the eyes of other employees. Wallace's conduct was not provoked by any conduct on the part of Respondent.

While the Act protects the right of employees to engage in concerted activities for the purpose of organizing employees, as noted above, the right cannot be exercised without regard to Respondent's right to maintain discipline, order, and respect in its establishment.

If Wallace's conduct on October 1 was indeed protected and if all she did during the October 7 interview was refuse to answer questions, there might be some question as to

whether Wallace's conduct during the October 7 interview was an integral aspect of Wallace's and her fellow employees' protected concerted efforts. But that is not what occurred. As found above, Wallace's conduct on October 1 was not protected. Limiting my consideration at this point to just what appears in the video, as I did above, Wallace lost the protection of the Act.¹¹ She was insubordinate. It was a difficult situation. Respondent's management attempted to maintain order, respect and discipline. Wallace interfered and she single-handedly undermined that effort. When she was asked about her unprotected conduct she did not just refuse to answer. Rather, she lied.

Was Wallace terminated because she was insubordinate and she lied about it or was she terminated because of her union activity? In my opinion it is the former. No one disputes that Wallace engaged in union activity and Respondent

¹¹ The video raises a question as to whether Wallace actually led Jackson through the employee entrance. Wallace denies that she did. The video shows Wallace next to Jackson in the parking lot after he reenters the lot. It also shows Wallace walking alongside Jackson as he goes toward the employee entrance. Additionally, Jackson hesitates just inside the employee entrance and then proceeds the moment Wallace passes him and she is walking in front of him. Since Wallace is not credible, I cannot credit her denial. Jackson obviously could have shed some light on this aspect of the case but the General Counsel did not call him as a witness. Under the circumstances existing here, it appears that Respondent reasonably concluded that Wallace led Jackson through the employee entrance even though she physically let him pass through first. Since Riley's observations were not available at that time, they obviously were not considered by Respondent when Wallace was discharged. While there is a conflict in the evidence regarding the extent to which, Respondent enforced its policy with respect to nonemployees on the plant floor, common sense would seemingly dictate that this is not the same situation as a retailer whose facility is open to the public and which has a room where food is dispensed, which room is also open to the public. This is a manufacturing facility. Albeit what occurred, occurred in the aisle and not between and around machines, it is still a manufacturing plant floor. It is not open to the public. The signs by entrances into the plant indicate employees only. Because Respondent's management might not have policed the area as well as possible and might not occasionally expel a violator does not mean that it acted in a disparate manner in its handling of the situations at hand. It is absolutely absurd for General Counsel to argue, in effect, that Respondent acted in a disparate manner because it did not discipline Burford when nonemployee Sylvetta Young came in the plant and attempt to slap her, Burford, because allegedly she was having an affair with Plant Manager James Young. There was no showing that something of the magnitude of the October 1 visit ever occurred at Respondent's facility before. Perhaps if something similar had occurred in the past, Respondent believed that same employee was somehow at fault and Respondent did not discipline that employee, then I would be in a position to compare apples to apples. In my opinion, what is covered on the video with respect to what occurred in the aisle and the recording of the October 7 Wallace interview clearly justify Wallace's termination. Although I believe that Respondent acted reasonably in concluding that Wallace led Jackson through the employee entrance and she should have been disciplined for that, it is not necessary to rely on this for, again, the insubordination depicted in the video and the lying at the October 7 interview clearly warranted Wallace's termination. The same applies with respect to Wallace's October 1 conduct near the time-clock. While it appears that Respondent, at the time of Wallace's discharge, did have statements from employees that Wallace continued to encourage Jackson to proceed through the plant, it is not necessary to rely on this evidence.

¹⁰ One witness did initially indicate that she heard something outside about a door being locked but she changed her testimony to indicate that she heard it inside the plant and not outside.

knew it. But in my opinion General Counsel has not demonstrated union animus. And even if General Counsel did make a prima facie showing under *Wright Line*, supra, I believe that Respondent has shown that it would have terminated Wallace absent her union activity and any concerted protected activity she may have engaged in. Respondent did not violate the Act in suspending Wallace on October 7 and terminating her on October 8.

As noted above, Respondent contends on brief, that assuming arguendo that it is found that it violated the Act, Wallace still should not be reinstated since the conduct which led to Wallace's discharge was flagrant and/or extreme, rendering her unfit for further service with the Employer and since Wallace admittedly lied in her Board affidavit, was impeached numerous times and gave conflicting testimony during the trial herein.

At pages 300 to 305 of the transcript herein Wallace gave the following testimony:

Q. Well, wouldn't you think you would probably remember it better back in November, than you do now, after seeing the video?

A. Once I seen the video, I remembered saying that. There was so much going on in those like 25 minutes.

Q. Then once again I would like to ask you, if it was only five or six weeks after the incident when you gave this sworn statement, and you were swearing to things like you didn't say "lock," that you said "clock," and now you say you just didn't remember at the time, why did you swear those things were true at the time, if, in fact, you didn't remember?

A. Well, I just—I remembered to the best of my ability, and as I began to think, and think, and try to think about what happened that day—Now, I remembered before I seen that video, but I had done already give that statement.

Q. And you didn't go back and tell the—

A. (Interposing) Yes, I told Mr. Glissendorf, and he said, "Well, why didn't you tell me that when you giving the statement," and I told him I could not remember it.

Q. When did you tell that to Mr. Glissendorf?

A. About the week before Thanksgiving.

Q. Okay. Did you tell him that you had—What did you tell him?

A. Well, he was investigating some more stuff, and—

...

Q. Now, that's the discussion with Mr. Glissendorf that you're now talking about, right?

A. No, no.

Q. Oh, you're talking about a different discussion.

A. I'm talking about a different discussion.

Q. Now, let's go to the different discussion, not the one that led to this Affidavit—okay? What happened in that discussion, the different discussion?

A. He called me to ask me something, I don't know what it was about—

Q. (Interposing) When?

A. It was sometime in November, I don't know.

Q. After you gave the November Affidavit?

A. Like maybe a few days after that.

Q. All right. And tell us what you talked about?

A. I don't know. He was asking me something about some gates, or something, being locked. Something concerning the plant out there, and asked me did I know anything about it.

Q. Did he ask you about your statement about the door being locked?

A. He didn't ask me about it, he just said do I remember saying anything about a door being locked, and I told him, No, then, I didn't remember.

Q. You're still referring to this telephone call now, right?

A. I'm referring to the telephone call.

Q. Now, what did he say?

A. He just ask me, "Do you remember saying anything about the door was locked?" He kept asking questions about the door being locked, and right then, I still couldn't remember saying it.

Q. And what did you tell him?

A. I told him, no.

Q. No, what?

A. That I didn't recall saying that.

Q. Okay. And that's all you said about it?

A. That's all I said about it.

And subsequently in her above-described state unemployment hearing she gave the following testimony at transcript pages 183 and 184:

A. But when I was giving my statement a month later to the NLRB the man that taken my statement kept asking me, "You sure you ain't—you don't remember nothing about—saying nothing about the door being locked or hiring somebody say"—and he just wouldn't—tell you—you know, he was like talking around it.

Q. Uh huh (affirmative response).

A. I said, now, he keep asking me that for some reason, you know. You know—he—and every time he would have to call and ask me something he would keep saying, "You sure you ain't heard nobody say nothing about the door was locked?"

Q. Uh huh (affirmative response).

A. And at that time I was going through a personal problem with my sister and my kids—

Q. Yeah. Yeah.

A. —so I didn't—didn't really have my mind on—

Q. Well, at first you said you didn't remember saying that.

A. I didn't remember it.

Q. Okay.

A. I didn't remember saying it.

Q. All right. Now, did you subsequently remember saying it?

A. I kept thinking about—I think a few days before Thanksgiving Mr. Lisenthor (spelled phonetically), I think his name was David Lisenthor, and he called me for something and I said—

Q. Okay.

A. —I remember. I remember saying the doors was locked and why I said those doors was locked.

Q. Okay. All right.

A. And he said, "Well, why [sic] come you didn't tell me that then? You should have told me that then." Like I—I said, "Well, I didn't know. I told you to the best of my knowledge."

Wallace appreciated the significance of her November 5 affidavit to the Board. She admitted that the Board agent who took it explained its purpose to her before he took it.¹² In it, the Board agent had Wallace go over what she said in the plant aisle on October 1 and four times Wallace "preferred" under oath that she said "clock."¹³ The fourth time she indicated as follows:

I don't remember saying anything like that [about the door being locked] in the aisle, though I might have said it. I just can't remember. I don't have anything to do with the front door at all the front door is usually locked. While I was standing with Smith and Jackson, I was telling the girls behind Jackson to "come in and clock" because they was talking, that is why I motioned. I was saying "clock" not "lock."

The consolidated complaint was not issued until November 29. As noted above, at one point in this proceeding and in the State proceeding Wallace testified that she advised a Board agent that she was recanting a very significant matter in her November 5 affidavit before the consolidated complaint herein was issued. According to certain of Wallace's testimony, the Board agent asked her why she did not tell him this on November 5 and he said that she should have told him this on November 5. This matter was brought out on cross-examination by one of Respondent's counsel. Before this matter was brought out on cross-examination, Wallace did not correct, modify, qualify, or supplement her November 5 affidavit to cover what she testifies she remembered after the November 5 affidavit was given but before the November 29 consolidated complaint was issued. Gary Smith supplemented his Board affidavit with respect to the Hicks matter so obviously this procedure was available. Affidavits of General Counsel's witnesses must be provided to the opposition, upon request, before cross-examination commences. In light of this, I cannot believe that a Board agent would not have required Wallace to memorialize the fact that she was recanting a very significant matter in her November 5 affidavit.¹⁴ I cannot believe that a Board agent would not have taken this action knowing that eventually opposing counsel would be relying on something the Board agent knew was recanted. And I would have to question whether a complaint would have been issued regarding Wallace if she indeed recanted the involved significant portions of her affi-

¹² More specifically, she testified "[w]ell, he [the Board agent] told me that they would take it in and it wasn't up to him. It was up to his boss. They would make a decision on *did I have a case*. . . ." (Emphasis added.)

¹³ Counsel for General Counsel, at transcript 465, in introducing the affidavit, indicated that she would only rely on those portions of the affidavit which are responsive to testimony elicited by Respondent's counsel. The document was received in its entirety over Respondent's objection. If somewhere in the video Wallace was heard saying something about clock or clocking in, one might wonder whether she was confused vis-a-vis fabricating testimony.

¹⁴ Surely, the alleged discriminatee in this kind of situation would have to testify.

davit sometime before Thanksgiving 1991 and was candid with respect to the remainder of her affidavit. Such recantation, if it occurred, would undoubtedly have caused whoever investigated this matter not to rely on what Wallace said. The Region already had reason to question Wallace's credibility in view of the strong language in the above-described May 30 Report on Objections which, as noted above, was upheld by the Board on appeal on October 24. If Wallace did recant her testimony on this very significant matter in her November 5 affidavit, she should not have changed her testimony as it appears she did at page 305 of the transcript herein. At that point in her testimony, it appears that Wallace, in effect, was recanting her alleged prior recantation. And if she was not, she did not attempt to explain why that was not the case. It is noted that Wallace first testified that she told the Board agent of her recantation "[a]bout the week before Thanksgiving," then she testified that the telephone conversation with the Board agent occurred "[l]ike maybe a few days after that [after she gave an affidavit to the Board on November 5]" and in the State proceeding she testified that the telephone conversation with the Board agent occurred "I think a few days before Thanksgiving." Thanksgiving was on November 28 in 1991. As noted above, the consolidated complaint herein was issued November 29.

It appears that the Board's processes were abused. In my opinion, under no circumstances is Wallace entitled to reinstatement.

CONCLUSIONS OF LAW

1. Earle Industries, Inc. is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the above-described consolidated complaint.

[Recommended Order for dismissal omitted from publication.]

APPENDIX A

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD TWENTY-SIXTH REGION

EARLE INDUSTRIES, INC.

and

Cases 26-CA-14700
and 26-CA-14755

AMALGAMATED CLOTHING AND TEXTILE
WORKERS UNION, SOUTHWEST REGIONAL
JOINT BOARD

COUNSEL FOR THE GENERAL COUNSEL'S AND RESPONDENT COUNSEL'S MOTION FOR POSTPONEMENT AND RESCHEDULING OF HEARING

Comes now Counsel for the General Counsel and Respondent's Counsel pursuant to Section 102.24 of the Board's Rules and Regulations and move that the hearing scheduled for May 26, 1992, be rescheduled for the month of August 1992 at the Honorable Judge West's convenience.

In support of said motion, the parties respectfully show the following:

1.

The Region is currently investigating charges against the Respondent in Cases 26-CA-15042 and 26-CA-15052, which are related to the pending litigation.

2.

The parties are actively pursuing settlement of the pending litigation.

Accordingly, the parties respectfully request that the hearing be rescheduled from May 26, 1992, to a date certain in August 1992 to be rescheduled by the Administrative Law Judge.

Dated at Memphis, Tennessee, this 21st day of May 1992.

Grace E. Speer
Counsel for the General Counsel

J. Gregory Grisham
Counsel for the Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this date, copies of the foregoing Motion for Postponement and Rescheduling of Hearing were served by regular mail and by facsimile transmission on the following:

The Honorable John H. West
Administrative Law Judge
Division of Judges
1550 Wilson Blvd., Suite 601
Arlington, VA 22209

I further certify that copies of the foregoing document were served by certified mail, return receipt requested, on the following parties:

Jeff Weintraub, Attorney
Greg Grisham, Attorney
Weintraub, Robinson, Weintraub & Stock
Suite 2560, One Commerce Square
Memphis, TN 38103

Dwayne Stillwell, ACTWU
1705 S. Broadway
Saint Louis, MO 63104

Scott Trotter, Attorney
Youngdahl & Youngdahl
P. O. Box 164808
Little Rock, AR 72216
Office of General Counsel
Amalgamated Clothing & Textile
Workers Union, AFL-CIO, CLC
15 Union Square West
New York, NY 10003

Dated at Memphis, Tennessee, this 21st day of May 1992.

John H. Goree, Supervisory Attorney
National Labor Relations Board
Twenty-sixth Region

Suite 800, Mid-Memphis Tower
1407 Union Avenue
Memphis, TN 38104-3627
Telephone 901-722-2854

APPENDIX B

United States Government
National Labor Relations Board
Division of Judges
1550 Wilson Boulevard - Suite 601
Arlington VA 22209-2426

September 8, 1992

J. Gregory Grisham, Esq.
Weintraub, Robinson, Weintraub
& Stock, P.C.
Suite 2560 One Commerce Square
Memphis, TN 38103

Re: Earle Industries, Inc.
Cases 26-CA-14700 & CA-14759

Dear Mr. Grisham:

Pursuant to your request on behalf of counsel for Respondent for an extension of time for filing briefs, time is hereby extended to September 30, 1992.

Yours truly,

Melvin J. Welles, Chief
Administrative Law Judge

cc: Grace Speer, Esq.
National Labor Relations Board
1407 Union Avenue, Suite 800
Memphis, TN 38104
Duane Stillwell
Director of Organizing, ACTWU
Southwest Regional Joint Board
1705 South Broadway
St. Louis, MO 63104

APPENDIX C

Hi Earley.

Hi.

Hi Louise.

Hi.

Earley there are just a few things I want to talk to you about. We are in the process of investigating the activities that occurred a week ago, Tuesday, October 1st, when Rev. King was here, not Rev. King, excuse me, pardon me, when Rev. Jackson was here. More particularly we are interested in looking into some of the activities on your behalf as far as Rev. Jackson's entry into our plant, O.K.? I am going to ask you a few questions and I would appreciate you cooperating in answering these questions. The first think I would like to know is if you in any way assisted or encouraged Rev. Jackson to come into the plant?

I'm not answering any of those questions.

Are you saying you don't know the answer to those questions?

I'm not going to answer any of those questions.

Do you have any knowledge as to why Rev. Jackson entered through the employee entrance rather than through the front?

I'm not going to answer that either.

Are you refusing to . . .

I'm not going to answer—if you are going to accuse me of something I have a right a right to have an attorney.

I am not accusing you of anything. I am investigating conduct on your behalf.

Let me get somebody to represent me while you are investigating.

I have no problem—under normal circumstances an employee does not have a right to have somebody to represent them with respect to an investigation of activities that are considered in violation of company policies. If you will feel more comfortable having a fellow worker in here with you I will be more than happy to allow you to have a fellow worker in here with you.

Well I'm still not going to answer any of those questions

You still won't answer any of those questions?

No I'm not going to.

I'm going to ask the questions.

You can ask them—that's fine.

If you don't want to respond to them or you don't want to answer them that is your prerogative. Now I am going to ask you some questions. Did you in any way interfere with or interrupt or make any comments to Rev. Jackson or anybody while Gary was talking to Rev. Jackson in an attempt to get Rev. Jackson to leave the plant and come around and enter through the front door?

I'm not answering that.

Do you know if Gary at any time instructed Rev. Jackson to leave the plant that he was in fact trespassing and that if he wanted to see myself or anybody in management he was to go around to the front door?

I'm not going to answer that.

Are you saying that you don't know the answer to that or are you just not going to answer.

I'm not going to answer.

Did you at any time motion to Rev. Jackson or anybody in the vicinity of Rev. Jackson that the front door was locked?

I'm not going to answer.

Did you at any time indicate to Rev. Jackson to proceed to the front office through the plant rather than to see that he went out through the employee entrance and entered the plant through the front door?

I'm not going to answer it.

Are you refusing to cooperate in an investigation of. . .

I'm just not going to answer your questions.

You are not going to answer the questions. Are you refusing to answer the questions?

I'm not refusing I'm just not going to answer them. I don't know what you are talking about and I'm not getting wound up in nothing.

I am merely investigating as I do or Gary does any actions on behalf of an employee that we feel are in violation of company policies.

Are you refusing to answer?

I'm not refusing—I'm not just gonna—if I'm under arrest I have the right to remain silent. So you can ask your questions.

You are not under arrest. You are merely being questioned just as any employee who is being questioned pertaining to an apparent violation of company policies.

I know what you are doing but like I say I would rather have somebody understand more of what you are trying to do to me.

I'm not trying to do anything. . .

I'm trying to protect myself.

I'm not trying to do anything other than to obtain the truth.

Well I won't answer any of your questions. Unless I have somebody that knows which way you are coming from.

All I'm asking you Earley is whether you did something or you didn't do something. In your own mind in your own opinion. That is not confusing.

No it's not confusing but I would rather not answer that.

You would rather not answer that?

That's right.

O.K. I can ask you this a hundred times and you're not going to answer my questions? Under what circumstances are you going to answer my questions?

Well why are you asking me those questions?

Because we are investigating conduct on your behalf that might quite possibly have violated company policies. That is the only reason we are asking these questions.

Keep on asking.

Gary Smith routinely asks employees about circumstances pertaining to possible company violations and all employees are expected to answer and cooperate with those investigations and apparently you are refusing to cooperate.

Well I don't understand what you are asking me and I'm not going to get myself in nothing that I don't understand what I'm answering. Not that I refuse but I don't understand exactly what you are up to and I will not answer the questions.

We believe, number one, that you interfered with Gary's management authority in the plant—that you were insubordinate toward your Personnel Manager—that you assisted and encouraged somebody to come into this plant to enter this plant in violation of company policy in violation, a non-employee of company policies—that through the assistance and encouragement of that employees, a number of which were scared, a number of which had their work interfered with, that's what we are looking into and the questions are very simple and to the point in asking you to respond as to what you did or didn't do on this occasion. I don't know that I can state these questions anymore simply than I have asked them. I'll start over again and try to make it as simple as possible. All I want is the truth Earley—that is all I'm looking for. I'm just looking for answers as to what you did or did not do in the presence of Rev. Jackson in the plant.

Well you seen it. Didn't you see the film and the video? Didn't you see them walk in together?

I saw what was on T.V. and that was it. I don't know what went on. I have talked to some people and I know what Gary has told me. I'm furthering this investigation. This company does not take action against individuals or consider

disciplinary action until such time as we have thoroughly investigated it. And that is exactly what I am doing right now.

Well you can still ask your questions but if I don't understand them I'm not answering those questions.

I'll start over.

You don't have to start over. You can continue.

I was basically through with the questions. I'll start over again and see if I can make it any more simpler for you. The first question I have is on October 1st did you in any way assist or encourage Rev. Jackson or lead Rev. Jackson into the plant through the employee entrance?

I'm not going to answer that.

Do you have any knowledge why Rev. Jackson came through the employee entrance versus him coming through the front door?

No, I don't.

Have you ever used our front door during lunch periods? Have you ever come and gone through the front door?

Yes I do.

Is that door open during lunch?

Yes its open.

Was that door open on that date?

I don't know.

Do you have any reason (telephone rang)

Let me ask that one more time. Do you have any reason to believe that the front door was locked on the day of Rev. Jackson's visit?

I don't know.

You don't know? You don't know if it was locked or not?

I don't know.

You don't know. Do you know if it would have been a violation of company policy for an employee to assist or lead a non-employee into the plant through an employee only entrance? Do you know if that would be a company policy?

I don't know.

Do you know if the door through which Rev. Jackson entered was an employee entrance?

Do I know? Well you know that you saw him come in through there.

Is that an employee entrance?

You know that is the employee entrance.

Did you at any time hear Gary, well let me back up a minute, did you witness Gary addressing Rev. Jackson in the plant.

There was so much noise I wasn't paying Gary no attention.

You weren't paying Gary any attention. Do you know if at any time he told Rev. Jackson that he was trespassing and that he needed to. . .

I don't know what Gary was—I don't know what Gary was saying.

Did you have anything to say to Gary or Rev. Jackson while they were in there?

You did not?

No I did not.

Did you at any time motion Rev. Jackson to come into a particular direction to move toward the plant?

I won't answer that question.

Is that not a simple question?

I'm not going to answer it.

Did you hear Gary, at any time, instruct Rev. Jackson that he was trespassing?

I'm not going to answer those questions. I'm going to get me a lawyer. So you can ask away all you want to ask.

A lawyer can't answer these questions.

I know I have a right to remain silent.

You certainly do.

I know that.

You don't have to answer these questions if you don't want to. I want to let you know that your failure to respond to these questions is your failure to investigate with a company investigation of your actions on October 1st. That is in violation of our company policies and I want you to know that and knowing that you still continue to refuse to answer those questions.

I told you I don't know about those questions.

You don't know if at any time you encouraged or motioned for Rev. Jackson to move closer to the office door in the plant.

I don't know.

And you do not know if at any time you advised Rev. Jackson or somebody in his group or party that the front door was locked?

I don't know.

You don't know?

You don't know or is the answer yes or no?

No .

The answer is no.

Is no.

You did not

I did not

You did not indicate to anybody that the front door was locked?

I did not.

Would you say you did not at any time motion or encourage Rev. Jackson.

I said I did not. You did not. In no point in time did you encourage him.

I did not.

Did you in no way interfere with Gary's efforts to . . .

I did not. I didn't say anything to Gary.

You did not interfere with his efforts to. . .

I hadn't said a word to Gary.

I'm not asking you if you said anything to Gary. Did you say anything to anybody that interfered with his efforts to have Rev. Jackson come though the appropriate entry to the plant.

I was walking down with him.

Is that all you were doing was walking with him.

I was walking with him.

Walking in front of him—behind him?

Sort of on the side of him like most people did.

You do not know why Rev. Jackson may have entered that door versus the front door?

No I do not.

But you do know that it is against company policy for a nonemployee to. . .

No I don't know. I don't know.

So you are saying that you don't know if it against company policy for non-employees to be out in the plant.

I see non-employees come in the plant a lot of times Peter.

With or without authorization.

Without authorization. I see the peoples that work out here have children come up in here and sometimes they have friends come to the door. I can see them.

Through the front foyer?

Right out there.

Right out where?

Come in that side door. I see plenty of people out here that are not authorized.

And never asked to leave, never stopped and asked to leave?

I don't know who asked them to leave. I have seen people in the plant I don't know who asked them to leave. Why they was out here but I have seen plenty of people out here.

So are you saying you made no effort whatsoever on your behalf to interfere with Gary's efforts to have Mr. Jackson.

I didn't say anything to Gary. I haven't said a word to Gary.

I'm not saying, I'm not asking if you said anything to Gary. Did you do anything or say anything that interfered with his efforts.

Not that I know of.

Any questions Gary?

No.

Did you proceed into the front foyer with Rev. Jackson when he went in there?

Into the front what?

Into the front office area.

Well there was so many cameramen that I couldn't get by really. I got in there in a little while but they was squeezing in and I come on back out.

But you entered that foyer with him when he went in there?

Ya me and a whole bunch of them entered in that room.

Did you at any time ever point to or show the way to Rev. Jackson or anybody in his party [EMW: I didn't point] to the entrance to the office area? [EMW: No] You never. . . [EMW: Gary brought them on to the office]

Ya I brought them into the office.

But you at no time pointed in that direction or [EMW: No] showed people the way.

Showed people?

Showed non-employees, Rev. Jackson and his group.

I don't know nothing about no non-employee. There was employees walking all around.

I'm talking about Rev. Jackson and anybody that was with him that was not an employee of our Company.

I didn't see anybody.

So you are saying that you did not in any way assist or encourage Rev. Jackson or anybody to come through that entrance into the office.

I did not.

You did not. Earley, we are going to have to investigate this matter further and as I told you we have belief that conduct, from what we can determine, that you engaged in and interfered with Gary's management authority and interfered with his ability to do his job. That your conduct was insubordinate toward Gary. That you not only assisted but encouraged Rev. Jackson and other non employees to come to the office through the plant rather than to proceed to the front door where visitors normally enter the plant. I think at this point I have no choice but to suspend you pending further investigation of this matter.

O.K.

Do you have anything else to comment about?

No sir.